Supreme Court, U.S.
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No. 02-

IN THE

Supreme Court of the United States

DONNA SANTA MARIE (a fictitious name of a real individual), Individually, on Her Own Behalf, and on Behalf of All Women Similarly Situated, *et al.*,

Petitioners,

v.

JAMES E. McGREEVEY, GOVERNOR OF THE STATE OF NEW JERSEY, in His Official Capacity, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The New Jersey Wrongful Death Statute affords a cause of action for all mothers whose children are tortiously injured prenatally, *at any age of gestation*, and die as a result of that tortious conduct. However, the same statute denies recovery to one class of mothers despite the fact they can establish every element of the cause of action, and sustain the identical losses as the mothers who are afforded claims under the statute - only because their children were still in the womb at the moment that death ensued from the prenatal injury. The petitioners, Donna Santa Marie, Mary Doe and Jane Jones, each lost their child as a result of the negligence of three separate doctors who performed abortions without voluntary and informed consents.

The petitioners challenged the State's denial of their Wrongful Death claims, asserting that the discriminatory classification must be strictly scrutinized because any woman to whom a doctor proposes an abortion is involved in a decision of whether or not to waive her fundamental interest in her relationship with her child protected by Due Process, the protection of which is the very purpose of the Wrongful Death Statute. They contended that depravation by the doctors of their ability to make an informed voluntary decision under those circumstances, so implicates or affects their fundamental rights, that the discriminatory classification must be strictly scrutinized.

The Third Circuit, failed to meaningfully address petitioners' substantive arguments, and stated, "it is unclear what constitutes a 'fundamental right', and what relationship a classification must stand in relation to that right to 'affect' it for these purposes (determining if strict scrutiny should be applied)." *Santa Marie, et al v. McGreevey, et al*, 314 F. 3d 136, 141, n.4 (2002).

1. Does New Jersey's Wrongful Death Statute, as construed by the New Jersey Supreme Court, which allows recovery for tortiously inflicted prenatal injuries which result in the child's death, but denies recovery for the same losses to the class of mothers whose children's deaths occur

in utero, violate the Equal Protection rights of those mothers where the injury and death of their children is caused by doctors who, in proposing submission to an abortion, negligently deprives them of an informed and voluntary consent and waiver of their fundamental rights?

2. Does the discriminatory classification of New Jersey's Wrongful Death Statute which denies recovery to a mother to whom abortion is proposed by a doctor - and therefore involves her in the decision of whether or not to waive her fundamental Due Process liberty interest in her relationship with her child - under circumstances where the doctor negligently misrepresents or withholds material facts, or otherwise deprives her of her ability to make an informed voluntary decision adversely "affect" her fundamental interests such that the Court must strictly construe the statute, or how the classification promotes the purposes of the Wrongful Death Statute, which is intended to deter conduct which destroys, among others, the mother's relationship with her child?

3. Does the reasoning and holding of *Alexander v. Whitman* 114 F.2d 1392 (3rd Cir 1997) apply where an abortion doctor negligently deprives the mother of a voluntary and informed decision about her waiver of her fundamental interest in her relationship with her child by misrepresenting, or failing to disclose, material facts necessary for an informed decision which directly affects the mother's decision making regarding her child?

4. Where New Jersey provides affirmative protection for the mother's fundamental interest in her relationship with her child in all other contexts (e.g. adoptions, and surrogacy contract), even during the period of gestation, by scrupulously enforcing safeguards designed to help insure that the mother's surrender or waiver of her interest in that relationship is voluntary and informed, and that waiver of her rights is a last resort after receiving counseling about all other options, does the denial of these same safeguards in the context of abortion violate the mother's Equal Protection rights?

PARTIES TO THE PROCEEDING

The five petitioners include Donna Santa Marie, Mary Doe and Jane Jones, all women who were subjected to involuntary or uninformed consent abortions who sued their respective doctors in negligence. Petitioners Teresa Jimenez, M.D. and Myranna Guerra-DeLuna, M.D. are obstetricians licensed to practice medicine in New Jersey who treat pregnant mothers to deliver their children alive, and do not perform abortions.

Although Mrs. Doe withdrew the portion of her complaint relative to the Wrongful Death claim, (see, District Court Order of November 27, 2000 at A48), she remains a plaintiff on the other aspects of the § 1983 complaint. *See, also Acuna, et al v. Turkish, et al*, 808 A. 2d 149 (2002).

The defendants are all sued in their official capacities and include: James E. McGreevey, Governor of New Jersey; David Samson, Attorney General of New Jersey; three county surrogates, Joseph P. Brennan (Essex County); Diane Gerofsky (Mercer County); and Kevin J. Hoagland (Middlesex County); and the members of the New Jersey Board of Medical Examiners: Joseph Gluck, Judith J. Gleason; Veronica E. Desmond; Glenn A. Farrell; Daniel Weiss; Arthur W. Perry, M.D.; Bernard Robins, M.D.; Michael T. Chen, M.D.; Karen C. Criss, C.N.M.; Arganey L. Lucas, Jr., M.D.; Clifton Lacy, M.D.; Bassam Haddad, M.D.; Donald C. Huston, Jr., D.O.; William V. Harrer M.D.; Ghias Moussa, M.D.; Gregory J. Rokosz, D.O.; James C. Ricketti, D.P.M.; Mammohan Patal, M.D.; Kevin P. Walsh; Kelly Reid, M.D.; Edwin Traynor, M.D.; and David Wallace, M.D.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	iii
Table of Contents	iv
Table of Cited Authorities	viii
Table of Appendices	xv
Abbreviations	xvi
Decisions and Orders Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Statement of the Case	1
A. The Nature of the Action and Procedural History	1
B. Statement of Facts	2
Reasons for Granting the Writ	5
I. The Third Circuit Refused To Follow The Decisions Of This Court, And Followed Instead Its Own Erroneous Decision In *Alexander v. Whitman*, 114 F.3d 1392 (1997), Stating That The U.S. Supreme Court Has Made It "Unclear What Constitutes A 'Fundamental Right' And What Relationship A Classification Must Stand In Relation To That Right To 'Affect' It For Purposes" Of Applying Strict Scrutiny.	7

Contents

	Page
A. New Jersey Tort Law Relevant To The Equal Protection Violations Of The Wrongful Death Statute	8
1. Uninformed Consent Negligence ...	8
2. Prenatal Injuries Resulting In Death	8
(a) The *Giardina-Portee* Emotional Distress Claim	9
(b) The Wrongful Death Claim ...	10
(c) The Survival Action Claim ...	10
3. The Irrational Nature Of The Classification Of Mothers Not Permitted Wrongful Death Damages	11
B. Denial Of The Protection Of The Wrongful Death Statute As It Is Applied To Negligent Termination Of Plaintiffs' Fundamental Interests By An Abortion Doctor Violates Equal Protection	13
1. The Classification Created By New Jersey Must Be Strictly Scrutinized	13
(a) The Mothers' Own Equal Protection Rights Are At Stake, and It is Their Actual Loss Which Defines The Classification Under Scrutiny	14

Contents

Page

(b) Only a Compelling State Interest can Justify the Discriminatory Classification 15

(i) Imposition of Strict Scrutiny 15

(ii) Plaintiffs Have a Fundamental Liberty Interest in the Relationship With Their Children 16

(iii) Strict Scrutiny and Wrongful Death Statutes 17

(a) The Framework Established by *Levy*, *Glona* and *Weber* 17

(b) The Reasoning of *Alexander v. Whitman* Does No Apply to This Case 20

2. New Jersey Has No State Interest, Either Compelling or Rational, Which Is Promoted by the Classification 25

(a) Where the Death Occurs Is Irrelevant to the Purpose of the Statute 25

(b) There is No Legitimate State Interest Promoted by the Discriminatory Classification .. 26

Contents

Page

(i) The Classification does not Promote the State Interest Identified by *Alexander* as the Statute is Applied in this Case 27

(ii) The "Interest" Identified by *Alexander* is not a Legitimate State Interest, and *Alexander* is in Direct Conflict with *Glona* 28

II. New Jersey Denies The Pregnant Mothers In The Petitioners' Class Protection Of Its Civil Laws Which Are Designed To Protect Against Involuntary And Uninformed Waiver Of Their Fundamental Rights, Protection Afforded All Other Pregnant Mothers 30

Conclusion 30

TABLE OF CITED AUTHORITIES

Page

Cases:

Acuna v. Turkish, 808 A.2d 149 (2002) ..... iii, 8, 9, 13

Alexander v. Whitman, 114 F.3d 1392 (1997) ..... ii, 6, 7, 20, 21, 22, 26, 27, 28, 29

Alfone v. Sarno, 432 A.2d 857 (N.J. 1981) 10

Baker v. Carr, 369 U.S. 186 (1962) 15

Bohr v. Penn. R. Co., 93 A.2d 190 (N.J. App. Div. 1956) 10

Brady v. United States, 379 U.S. 742 (1970) 19

Caban v. Moohammed, 441 U.S. 380 16

Carey v. Brown, 447 U.S. 453 (1980) 19

Carey v. Lovett, 622 A.2d 1279 (1993) 8-9, 10, 27

Carrington v. Rash, 380 U.S. 89 (1965) 15

Cassano v. Durham, 436 A.2d 118 (L. Div. 1981) ... 10

Clark v. Jeter, 486 U.S. 456 (1988) 15, 23, 28

Colorado & Santa Fe R. Co. v. Ellis, 165 U.S. 150 (1897) 29

Cowan v. Doering, 545 A.2d 159 (N.J. 1988) 18, 21

Dandridge v. Williams, 397 U.S. 471 (1970) 29

Cited Authorities

Page

Dietrich v. Inhabitants of Northampton, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct.1884) 9

Dunn v. Blumstein, 405 U.S. 330 (1972) 6, 19

Dunn v. Roseway, Inc., 333 N.W.2d 830 (Iowa 1983) 25

Dyer v. City of Newark, 416 A.2d 429 (N.J. A. Div. 1988) 10

Espardere v. Feld, 649 F. Supp. 1483 (D. Colo. 1986) 25

Farley v. Sartin, 466 S.E. 2d 528 (W. Va. 1995) ... 25

Gentry v. Gilmore, 612 So. 2d 1241 (Ala. 1993) .. 25

Giardina v. Bennett, 545 A.2d 139 (N.J. 1988) 9, 10, 11, 12, 13, 27

Glona v. American Guarantee and Liability Insurance Co., 391 U.S. 73 (1968) ..... *passim*

Gomez v. Perez, 409 U.S. 535 (1973) 15, 28

Grayned v. City of Rockford, 408 U.S. 104 (1972) ... 19

Green v. Bittner, 424 A.2d 210 (1980) 10, 14, 16, 25

Griffin v. Illinois, 351 U.S. 12 (1956) 15, 25

Harper v. Virginia, 383 U.S. 663 (1966) 6, 15, 19

Cited Authorities

Page

Housen v. Olesky, 176 A.2d 297 (N.J. App. Div. 1962) 10

Johnson v. Zerbst, 704 U.S. 408 (1978) 19

Kramer v. Union Free Sch. Dist., 395 U.S. 21 (1969) 19

Labine v. Vincent, 401 U.S. 532 (1971) 18, 23

Largey v. Rothman, 540 A.2d 504 (1988) 8

Lassiter v. Department of Soc. Serv., 452 U.S. 18 (1981) 16

Lehr v. Robertson, 463 U.S. 248 (1983) 16, 17

Levy v. Louisiana, 391 U.S. 68 (1968) ..... *passim*

Mathews v. Lucas, 427 U.S. 495 (1976) 23

Mem. Hospital v. Maricopa County, 415 U.S. 250 (1974) 19

Meyer v. Nebraska, 262 U.S. 390 (1922) 16

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 16

Morey v Doud, 354 U.S. 457 (1957) 6, 29

N.J. Welfare Rights Org. v. Cahill, 411 U.S. 619 (1973) 15, 25

Cited Authorities

Page

Oregon v. Mitchell, 400 U.S. 112 (1970) 19

Parham v. Hughes, 441 U.S. 347 (1979) 6, 23, 24

Parvin v. Dean, 7 S.W.3d 264 (Tex. App.-F.W. 1999) 6

People Express v. Conrail, 495 A.2d 107 (N.J. 1985) 18, 21

Pickett v. Brown, 462 U.S. 1 (1983) 23, 28

Portee v. Jaffee, 417 A.2d 521 (1980) 9, 13, 14

Quilloin v. Walcott, 434 U.S. 246 (1978) 16

Reynolds v. Sims, 377 U.S. 533 (1964) 15

Santosky v. Kraemer, 455 U.S. 745 (1982) 16, 17

Shapiro v. Thompson, 394 U.S. 618 (1969) 6, 19

Smith v. Brennan, 157 A.2d 497 (N.J. 1960) 8, 9, 11, 12, 13, 27

Smith v. Organization of Foster Families, 431 U.S. 816 (1977) 16

Soden v. Trenton and Mercer Cty. Trust Co., 127 A. 558 (N.J. 1925) 10

Stanley v. Illinois, 405 U.S. 645 (1972) 16, 18, 20, 22, 23

Page

Volk v. Baldazo, 651 P.2d 11 (Id. 1982) 25

Weber v. Aetna Casualty & Surety Co., 406 U.S. 164 (1972) ..... *passim*

Weinberg v. Dinger, 524 A.2d 366 (N.J. 1987) 18, 21

Wolff v. Mercer Med. Cent., 532 A.2d 265 (N.J. App. Div. 1987) 10

United States Constitution:

Fourteenth Amendment 1

Statutes:

28 U.S.C. § 1254(1) 1

28 U.S.C. § 1291 1

28 U.S.C. § 1331 1

28 U.S.C. § 1343 1

28 U.S.C. § 1343(a)(4) 1

28 U.S.C. §§ 2201-02 1

42 U.S.C. § 1983 1

42 U.S.C. § 1988 1

N.J.S.A. 2A:15-3 10

Cited Authorities

	Page
N.J.S.A. 2A:31-1 to 6	1, 10
N.J.S.A. 2A:31-4	10
N.J.S.A. 9.3 1(b)	1
N.J.S.A. 9.3 1(c)	1
N.J.S.A. 9:3-40	1
N.J.S.A. 9:3-41	1
N.J.S.A. 9:3-41.1	1
N.J.S.A. 9:3-42	1
N.J.S.A. 9:3-45	1
N.J.S.A. 9:3-45.1	1
N.J.S.A. 9:3-45b(1)	1
N.J.S.A. 9:3-47	1
N.J.S.A. 9:3-50	1

Cited Authorities

Page

Rules:

F.R.C.P. 12(b)(6) 1, 2

F.R.C.P. 57 1

F.R.C.P. 65 1

Supreme Court Rule 10(a) 5

Supreme Court Rule 10(c) 5

Other Authorities:

Stuart M. Speiser, *Recovery for Wrongful Death*, § 3.47, § 3.53 (Lawyers Co-op, 2d 3d. 1975) 25

Tussman and tenBroek, *The Equal Protection of the Laws*, 57 Cal. L. Rev. 341 (1949) 26

TABLE OF APPENDICES

Page

Appendix A — Opinion Of The United States Court Of Appeals For The Third Circuit Dated And Filed December 24, 2002 ..... 1a

Appendix B — Order Of The United States District Court For The District Of New Jersey Dated February 5, 2001 And Filed February 13, 2001 ..... 13a

Appendix C — Order Of The United States District Court For The District Of New Jersey Dated January 18, 2001 And Filed January 23, 2001 .. 15a

Appendix D — Memorandum Opinion And Order Of The United States District Court For The District Of New Jersey Dated November 27, 2000 And Filed November 28, 2000 ..... 17a

Appendix E — Statutes Involved 50a

ABBREVIATIONS

A Appendix to the Petition for Certiorari

Pa Plaintiffs' Appendix in Third Circuit

DECISIONS AND ORDERS BELOW

On December 24, 2002, the United States Court of Appeals for the Third Circuit issued an opinion affirming the orders of the U.S. District Court, District for New Jersey, which had granted the defendant's motions to dismiss the complaint for failure to state a claim upon which relief can be granted pursuant to F.R.C.P. 12(b)(6) (see, opinion of U.S. Ct of App., A1-12). The opinion of the Court of Appeals is reported at 314 F.3d 136 (U.S. App. 2002). On December 24, 2002, the Court of Appeals entered an order affirming the orders of the District Court dated November 27, 2000 (at A48-49), January 18, 2001 (at A15-16), and February 5, 2001 (at A13-14), dismissing the complaint. The opinion of the District Court is found at A17 to A47).

STATEMENT OF JURISDICTION

The U.S. Court of Appeals filed its opinion on December 24, 2002. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This petition involves the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, New Jersey's Wrongful Death Statute, N.J.S.A. 2A:31-1 to 6 (A50-52), and informed consent and voluntary consent provisions of New Jersey's adoption statutes N.J.S.A. 9.3 1(b) & (c), 9:3-40, N.J.S.A. 9:3-41, 41.1, 42, 45, 45.1, 45b(1), 47 and 50; (A53-A62).

STATEMENT OF THE CASE

A. The Nature of the Action and Procedural History

This is a class action pursuant to 42 U.S.C. §§ 1983 and 1988 seeking a judgment declaring that New Jersey's Wrongful Death Statute, as applied, violates the Equal Protection Rights of the plaintiffs. Jurisdiction was invoked under 28 U.S.C. §§ 1343, 1331, and 1343(a)(4). Declaratory and injunctive relief was authorized by 28 U.S.C. § § 2201-02, F.R.C.P. 57 and 65, and by the equitable powers of the District Court. The appellate jurisdiction of the U.S. Court of Appeals was invoked under 28 U.S.C. § 1291.

The central thrust of the complaint is that New Jersey's denial to the plaintiffs of the Wrongful Death damages violates

the mothers' Equal Protection rights. Although the discriminatory classification which excludes the petitioners from the protection of the statute is totally irrational, the statutory classification must be subjected to the strictest scrutiny because the fundamental interest of the mothers in their relationship with their children is directly implicated. The mother considering an abortion is involved in the decision of whether or not to waive her fundamental right and the doctors who performed the abortions were directly involved in the termination of the mother's fundamental interest in her relationship with her child, without obtaining an informed voluntary consent.

New Jersey also denies mothers contemplating waiver of their fundamental rights by abortion the legal protections given other pregnant mothers designed to insure that any waiver of that fundamental interest is truly informed and voluntary.

B. Statement of Facts[1]

Plaintiffs Jane Jones, Mary Doe[2] and Donna Santa Marie all instituted timely suits in the Superior Court of New Jersey, venued in Mercer, Middlesex and Essex Counties respectively, against their physicians asserting Wrongful Death, and Emotional Distress claims for the negligence of the doctors in causing the deaths of their children. (Complaint, ¶6, 7, 10, 46, 62, 75). Each defendant failed to obtain, as was their duty, an informed voluntary consent for the abortion procedures (¶23, 24, 27, 51, 66, 76, 78).

Donna Santa Marie was a high school student who resided with her parents when she became pregnant. She and the baby's father, a college graduate, decided to marry and raise the baby. Her parents however, demanded that she submit to an abortion. Donna refused. Thereafter, her parents engaged in a protracted series of disciplinary actions designed to force her to submit to an abortion against her will. Donna steadfastly refused. After two weeks of angry demands, Donna's parents

1. Since the complaint was dismissed under F.R.C P. 12(b)(6), the U.S. Court of Appeals accepted as true all of the facts set forth in the complaint. See, *Santa Marie et al v. McGreevey, et al*, 314 F.3d 136, 139 (2002).

2. Each of these are fictitious names of actual plaintiffs. Mary Doe has pursued her State Court action under her true name of Rosa Acuna.

sent her to stay with her aunt in another state. After a week of enduring her aunt's arguments and demands, Donna still refused. At that point, Donna's parents scheduled an abortion for Donna without her knowledge. They went to her aunt's home, and told Donna that they would sign a criminal complaint against the baby's father if she did not go to the abortion clinic with them. Out of fear, she went to the clinic, not knowing how she would stop the abortion. When she arrived at the clinic, she signed a short one page "consent" form which contained no material disclosures. However, she was then given a questionnaire, on which she wrote that she considered abortion "murdering my baby" and that she was there because her parents were forcing her.

In light of these responses, the doctor told Donna's parents that he could not perform the abortion. Her parents then took Donna back to New Jersey. The next day her father, in a fit of rage, punched Donna in the abdomen. She and her baby were not harmed, but her father started interviewing abortion doctors in New Jersey and after two days, settled on one. With the same threat of prosecution of the baby's father used to force her to the first abortion clinic, Donna's parents forced her to the second doctor's office in New Jersey. When she arrived, Donna signed the same kind of consent she signed at the clinic. She then waited for the written questionnaire to fill out like she did the first time. She was not given one. She then waited to speak to the doctor to discuss her circumstance. She never got to talk to him. She was brought into the operating room, anaesthetized, and the baby was taken from her. (Complaint at ¶ 23, 24, 27, 35-38 at Pa 13 to Pa 23).

Mary Doe (Rosa Acuna) was a 29 year old married woman and mother of a 30 month old daughter delivered by an emergency C-Section, and a nine month old daughter delivered by a repeat C-Section. Mrs. Doe was born in Puerto Rico and did not graduate high school. In April, 1996, she went to the doctor who had been her regular gynecologist for the previous five years, who had delivered her second child by c-section, because she was having recurrent abdominal pain. The doctor determined that she was pregnant and recommended an abortion. Mrs. Doe wanted to know only one thing: was a

human being already in existence. Did the procedure involve terminating the life of a living human being, or did it somehow prevent a human being from coming into existence?

The doctor misrepresented the facts to Mrs. Doe, telling her "Don't be stupid, it is nothing but some blood". Dr. Turkish states that he routinely tells women who ask that or similar questions that "It is only some tissue." Trusting the doctor, Mrs. Doe signed a two sentence consent for a "T.O.P." and the doctor performed an abortion. Mrs. Doe experienced bleeding on and off for three and a half weeks until she had a massive hemorrhage. She was rushed to a local hospital where she was examined and admitted. While lying on a Gurney in the Emergency Room, Mrs. Doe asked a nurse "What is wrong with me?" The nurse told her "They left part of your baby in you." Not being able to reconcile what Dr. Turkish had told her, and what the nurse had said, she ruminated about the disparity. Upon discharge from the hospital, Mrs. Doe went to a local library, took out some books and read about the development of the unborn child. She discussed the matter with others, and based upon her readings, realized that the doctor had misrepresented the facts.

She became depressed; she became angry with the doctor and angry with herself. She would not have had the procedure if she had known the truth. She had nightmares, and went through mourning rituals, deep depression and sought counseling.

For his part, the doctor later admitted that when he treats a pregnant woman, he has two patients, and a pregnant woman considering any procedure would normally want to know about the risks of the procedure to both patients. Yet, he denied that the second patient even existed when Mrs. Doe made her inquiry. (Facts found in record at Pa 392 to 394; Complaint, ¶ 27).

Jane Jones, like Mrs. Doe, was subjected to an uninformed consent abortion to which she would not have consented if the fact the procedure terminated the life of a human being had been disclosed to her (Complaint, ¶24). The State Court stayed Mrs. Jones' case to await the outcome of this case.

Plaintiffs Teresa Jimenez, M.D. and Myrana Guerra-DeLuna, M.D. are obstetricians licensed to practice medicine in New Jersey. (¶8, 9). Some of the expectant patients under their care ask about abortion. (¶8, 9, 19, 89, 90, 96, 97, 127). These plaintiffs care for and counsel these patients, but they are not trained to perform abortions and only serve the mothers with the purpose of delivering their children alive. (¶8, 9, 26, 90, 97). Drs. Jimenez' and DeLuna's patients have an important interest in their relationship with their children (¶28, 29) (Affidavit of Elizabeth Fox-Genovese, Ph.D. at Pa311-Pa343). The act of a physician terminating the life of a child during the gestational ages, often conflicts with the mother's interests in her relationship with her child and her interest in her child's life (¶28, 29, 93) (Pa 311-343). Often the fundamental interests of the plaintiffs' patients are destroyed because other doctors perform uninformed or involuntary abortions on their patients. All of their current patients are at the same risk. Often they lose the opportunity to care for these patients, and deliver their children, to their financial detriment. (¶91-93; 98-99).

Each of the plaintiffs' children, at every age of gestation, were complete, separate and unique human beings (¶17) (*See*, Certifications of plaintiffs experts, Dr. Mark at A150-A185, Dr. Peeters-Ney at Pa186-Pa206, Dr. Langer at A207-A244, Dr. deVeber at Pa245-Pa267, and Dr. Saugstad at Pa268-Pa310)

REASONS FOR GRANTING THE WRIT

While this case arises out of disputes between three women and their doctors who performed medical procedures without first obtaining informed and voluntary consents, what is at stake is the integrity of the fundamental liberty interests of more than one million women each year who are faced with the decision of whether or not to waive what is perhaps the most important liberty interest they possess in all of life and one of the greatest benefits life offers them - their interest in their relationship with their children.

The Writ of Certiorari should be granted in this case under Rules 10(c) and 10(a) for three separate reasons. First, the decision of the Court of Appeals is in direct conflict with the controlling decisions of this Court, including: (a) those which set forth the principles of Equal Protection, as this Court has

applied them to State Wrongful Death Statutes, such as *Levy v. Louisiana*, 391 U.S. 68 (1968); *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968); *Weber v. Aetna Casualty & Surety* Co., 406 U.S. 164 (1972); and *Parham v. Hughes*, 441 U.S. 347 (1979); and (b) those which delineate the need for a relationship between a discriminatory classification created by the state and the purpose of the statute in which it is found, and principles which dictate imposition of strict scrutiny of those classifications, such as *Harper v. Virginia*, 383 U.S. 663 (1966); *Morey v. Dowd*, 354 U.S. 457 (1957); *Shapiro v. Thompson*, 394 U.S. 618 (1969); and *Dunn v. Blumstein*, 405 U.S. 330 (1972) and *Weber v. Aetna, supra.*

Second, and perhaps most importantly, this case involves questions of Federal Constitutional law of significant magnitude, which have not been directly addressed by this Court. They should be decided at this time not only because of their clear importance, but because of the tremendous magnitude, breath and depth of the class of women whose interests are adversely affected each year.

Third, there is a conflict among the decisions of the U.S. Court of Appeals, State Appellate Courts and an Appellate Courts in another state. See, and compare *Santa Marie v. McGreevey*, 314 F.3d 136 (2002) and *Alexander v. Whitman*, 114 F.3d 1392 (1997) with *Parvin v. Dean*, 7 S.W. 3d 264 (Tex. App.-F.W. 1999). Whether or not the State Appellate decision in *Parvin* is considered "a State Court of last resort", there are now no less than five reported opinions concerning the constitutionality of Wrongful Death States which discriminate against the petitioners' class. The issues have been sufficiently percolated and the magnitude of the issues and the failure of the Court of Appeals to follow decisions of this Court counsels for this Court to grant certiorari.

I. The Third Circuit Refused To Follow The Decisions Of This Court, And Followed Instead Its Own Erroneous Decision In *Alexander v. Whitman*, 114 F.3d 1392 (1997), Stating That The U.S. Supreme Court Has Made It "Unclear What Constitutes A 'Fundamental Right' And What Relationship A Classification Must Stand In Relation To That Right To 'Affect' It For Purposes" Of Applying Strict Scrutiny.

The Third Circuit decision in this case incorrectly decided constitutional issues of vast magnitude which affect millions of women. In doing so, the Third Circuit failed to follow the controlling precedent of this Court, but instead stated that its erroneous decision in *Alexander v. Whitman*, 114 F.3d 1392 (1997), "is dispositive here." *Santa Marie, et al v. McGreevey, et al* 314 F.3d 136, 141 (3d Cir. 2002). For that reason, the Third Circuit offered no analysis independent of that found in *Alexander*, and did not meaningfully address the conflicts between *Alexander* and the decisions of this Court. In fact, the Third Circuit was actually looking for guidance from this Court because of it's apparent inability to apply the principles of Equal Protection delineated by this Court, to the unique context of this case. In evidence of that difficulty, the Third Circuit made the rather extraordinary statement that:

> **"It is unclear what constitutes a 'fundamental right' and what relationship a classification must stand in relation to that right to 'affect' it for these purposes."** (Deciding when to impose strict scrutiny). *Santa Marie*, 314 F.2d at 141, n.4. (Emphasis added).

The fact that the Third Circuit announced that it was "unclear" to it what constituted a "fundamental right" and how that right must be "affected" in order to impose strict scrutiny, itself, demonstrates the need for this Court to grant certiorari. If the Third Circuit is correct, that this Court's decisions are too "unclear" for that Court to reach a proper conclusion, then only this Court can bring clarity to the issues. If, on the other hand - which the petitioners believe is this case - this Court's declarations are sufficiently clear for the Third Circuit to have correctly decided this matter in favor of

the petitioners, this Court should grant certiorari because the issues are of vast significance; the Third Circuit has now twice failed to properly follow the controlling precedent of this Court; and the issues have percolated over five different cases which have resulted in Appellate Courts reaching directly opposite conclusions concerning the same Equal Protection violation.

A. New Jersey Tort Law Relevant To The Equal Protection Violations Of The Wrongful Death Statute

1. Uninformed Consent Negligence

Plaintiffs Jane Jones, Mary Doe, and Donna Santa Marie each filed uniformed or involuntary consent negligence actions in the Superior Court of New Jersey against their respective doctors, each having three different damage counts recognized as recoverable under New Jersey law for prenatal injuries resulting in the child's death. Uninformed consent is a negligence concept predicated upon the duty of a doctor to disclose all information relevant for a reasonable patient to make an informed decision. *Largey v. Rothman*, 540 A.2d 504, 505-06 (1988). A fact must be disclosed if a reasonable patient in the plaintiff's position would likely attach significance to it in deciding to undergo or forego a procedure. *Id.* at 507-508; 510-11. It is now established under New Jersey law that a doctor who proposes to perform an abortion must disclose to the mother all facts a reasonable patient would consider relevant to her decision, including the fact that a first trimester abortion terminates the life of a living human being (if a jury makes the necessary findings of fact). *Acuna v. Turkish*, 808 A.2d 149 (2002).

2. Prenatal Injuries Resulting In Death

New Jersey recognizes personal injury claims for children who are injured in utero at any age following conception as a result of tortious conduct. *Smith v. Brennan*, 157 A.2d 497, 504 (N.J. 1960). If the child dies from injuries which are sustained in utero, damages are recoverable by the survivors in wrongful death, and by the estate of the child for the injuries while the child was alive in the same manner as if the injuries were sustained after birth. See, e.g. *Carey v. Lovett*, 622 A.2d 1279

(1993). Three of the reasons why *Smith v. Brennan* recognized the cause of action for prenatal injuries are especially relevant here. First, *Smith* rejected the false assumption of fact found in *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14, 52 Am. Rep. 242 (Sup. Jud. Ct. 1884) that the child was not a separate human being, but only "a part of his mother". *Smith* at 502. Second, the Court rejected the argument that a cause of action should not be extended for prenatal injuries because proof of a causal connection between tortious conduct and prenatal injury is so difficult as to render the proof "mere conjecture" or "speculative". *Id* at 503. Third, *Smith* rejected limiting the claim for injuries sustained only after the baby reaches the age of so-called "viability", since "viability" has "no relevancy in the determination of the question of liability for wrongful conduct." *Id.* at 504-05.

(a) The *Giardina-Portee* Emotional Distress Claim

One who suffers severe psychological injury as a result of witnessing the injury and death of a close family member has a claim for emotional distress. *Portee v. Jaffee*, 417 A.2d 521 (1980). In *Giardina v. Bennett*, 545 A.2d 139, 140-143, the New Jersey Supreme Court extended recovery for these Common Law Damages to circumstances where a pregnant mother suffered emotional distress because of the tortious injury and death of her unborn child which occurs in utero. See, also, *Carey v. Lovett*, 622 A.2d 1279 (1993).

The *Giardina-Portee* damages resulting from prenatal injury causing death in utero arises out of the same "intimate bonds" and "intimate relationship" between a mother and child during pregnancy from which the wrongful death action derives. *Giardina*, at 142. Significantly, *Giardina* expressly acknowledged that in pre-birth deaths the loss of the child satisfies *Portee's* requirement that the plaintiff sustain the actual loss and death of a family member, a "loved one". *Id*, 143. The *Giardina-Portee* Emotional Distress claim for the loss of the child may be brought by the mother for the death of her unborn child due to a first trimester abortion resulting from an uninformed consent. *Acuna v. Turkish*, 808 A. 2d 149 (2002).

(b) The Wrongful Death Claim

The wrongful death statute (*N.J.S.A. 2A:31-1 to 6*) creates a claim for a mother whose child dies as a result of tortious conduct. *Green v. Bittner*, 424 A.2d 210 (N.J. 1980). It did not exist at British or early American common law. *Giardina v. Bennett*, 545 A.2d 139, 145 (N.J. 1988). It did not, however, create a new genre of liability. The basis of liability is the same as those for other losses where death is not involved. Under the act, a mother is entitled to recovery for the "pecuniary" value of the loss of the companionship of her child. *Green v. Bittner, supra; Carey v. Lovett*, 622 A.2d 1279, 1295 (N.J. 1993). The damages derive from, and provide compensation for, the loss of companionship and special relationship between a mother and her child over their lifetime. *Green*, at 217; *Giardina*, at 140. It is not required for recovery that the survivor was dependent upon the decedent. *N.J.S.A.* 2A:31-4; *Cassano v. Durham*, 436 A.2d 118 (L. Div. 1981); *Wolff v. Mercer Med. Cent.*, 532 A.2d 265 (N.J. App. Div. 1987); *Housen v. Olesky*, 176 A.2d 297 (N.J. App. Div. 1962); *Bohr v. Penn. R. Co.*, 93 A.2d 190 (N.J. App. Div. 1956). The wrongful death damages are recoverable where prenatal injuries result in the child's death. *Carey v. Lovett*, supra.

(c) The Survival Action Claim

The Survival Action Statute, *N.J.S.A.* 2A:15-3, allows a claim for an injured child, which the child would have had if the child's death had not ensued, to be prosecuted after the child's death. *Dyer v. City of Newark*, 416 A.2d 429 (N.J. A. Div. 1988); *Soden v. Trenton and Mercer Cty. Trust Co.*, 127 A. 558 (N.J. 1925); *Alfone v. Sarno*, 432 A.2d 857, 860-63 (N.J. 1981); *see, Giardina*, 542 A.2d at 146. Survival Action damages are recoverable where the injury which causes death occurs in utero. *Carey*, supra. Thus the wrongful death, survival action and *Portee* causes of action provide separate damages for the loss of different interests. The *Giardina-Portee* claim is designed to protect the health of the mother (emotional distress due to "loss of a loved one"), rather than the mother's relationship with the child (protected by the Wrongful Death claim) or the child's health and life (Survival Action).

3. The Irrational Nature Of The Classification Of Mothers Not Permitted Wrongful Death Damages

Giardina v. Bennett, 545 A.2d 139 (1988), held that prenatal injury resulting in death is recoverable under the Wrongful Death Statutes. Noting that under *Smith v. Brennan*, "a child may recover for tortiously inflicted prenatal injuries", *Giardina* concluded that the statutory requirement which limits recovery for wrongful death to situations where the decedent's death is one "such as would, if death had not ensued, have entitled" the child to maintain an action for "damages resulting from the injury" is satisfied. *Giardina*, 545 A.2d at 146 (n.2). The class of mothers permitted Wrongful Death damages for prenatal injuries involve mothers of children of every age from conception to full gestation without regard to "viability". *Smith* at 504-505. However, *Giardina* construed the wrongful death statute as excluding a subclass of mothers based exclusively on where the child was at the time death ensued. If a child is injured in utero, at any age of gestation, but lives but for a moment outside the mother, these damages may be recovered. If the same child, at the same age, is injured in utero by the same tortious act, but his death ensues in the mother's body, the mother may not recover these damages.

The mother's actual loss, however, does not depend on where her child happened to be at the time death ensued and where death ensued is totally irrelevant to any element of the claim. Thus, the excluded class of mothers are denied recovery despite their being among those who the statute is designed to protect and who are able to prove every element of the cause of action.

There is only one reason why *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) construed the Wrongful Death Statute to include under its coverage mothers of children who suffered tortiously inflicted prenatal injuries resulting in death; but exclude only those mothers where death from those injuries ensued in the womb. *Giardina* found that the 19th Century legislature intended to exclude mothers of unborn children from coverage solely because of a false assumption of scientific fact. *Smith v. Brennan*, 157 A. 2d 497 (N.J. 1960) found it necessary to correct that same mistake of fact because it worked an unacceptable

injustice. *Giardina* retained *Smith*'s treatment of the child as a "person", but retained the last remnant of the repudiated mistake of scientific fact. The result is a hybrid legal treatment of the child based upon conflicting assumptions which creates an irrational class of mothers who are excluded from recovery for no valid reason.

The *Giardina* Court made it clear that all it did was construe the Wrongful Death Statute based upon what the Court concluded was the intent of the 19th Century legislature which wrote it:

> At the time the Act was enacted it was not generally thought that a fetus could be considered a "person," in a legal or juridical sense. This is evidenced by the common law, which treated an unborn child as being "merely a part of his mother without separate existence or personality." *Smith v. Brennan*, 31 N.J. 353, 356 (1960) (discussing common-law treatment of the unborn); . . . It is readily inferable that the Legislature adopted this common-law understanding of the concept of a "person" in the adoption of the Wrongful Death Act." *Giardina* at 143.

Thus, the "common-law understanding" that the unborn child was "merely a part of his mother without separate existence or personality" led the *Giardina* Court to conclude that the 19th Century Legislature intended to exclude from recovery under the statute, damages sustained by mothers of a deceased unborn child. This understanding of the 19th Century Legislature was assailed by the New Jersey Supreme Court in *Smith v. Brennan*, 157 A. 2d (N.J. 1960) (cited by *Giardina* to support its construction of the statute) as a false assumption of fact, which was outdated and useless for the modern development of common-law torts designed to avoid injustice. *Smith*, at 502-505.

Giardina observed that the Judge-made rule should be applied only where the Court found it necessary to "avoid the inadvertent and unintended creation of a statutory anomaly . . ." *Giardina* at 147. Since *Giardina* found that there was only one construction of the statute which would advance the

legislative intent, the Court could not frustrate that clear intent based upon the state law concepts before the Court. *Id.* at 143-146.

For that reason, although the Court recognized the child in utero as a person in fact, it denied the Wrongful Death Claim to mothers if their child died in utero. In *Smith*, it was understandable why the Court recognized the unborn child as a person, but did not allow recovery if the child was not born alive: *Smith* was only concerned about injury to the child. However, that consideration is irrelevant to the purpose of the Wrongful Death Statute because it is the mother's loss, not the child's, which is at stake, and her loss is the same regardless of where death ensues..

However, *Giardina's* refusal to adhere to the outdated understanding that the child was "merely a part of its mother with separate existence or personality" when it created the cause of action for prenatal injuries in *Smith*, was again asserted by the *Giardina* Court itself, in order to recognized the existence of the unborn child who dies in utero as a separate family member for purposes of the modern common-law *Giardina-Portee* claim. The mother is entitled to recover damages for her "emotional distress and mental anguish caused by the negligent conduct of the doctor that results in the stillbirth" for which the mother was present "in the face of inflicted injury or death of a loved one . . ." *Giardina* at 143. Recently, the New Jersey Appellate Division held that the death of an unborn child in the mid first trimester constitutes the death of a family member for purposes of a *Giardina - Portee* claim arising out of an uninformed consent abortion. *Acuna v. Turkish*, 808 A. 2d 149 (N.J. App. Div. 2002).

B. Denial Of The Protection Of The Wrongful Death Statute As It Is Applied To Negligent Termination Of Plaintiffs' Fundamental Interests By An Abortion Doctor Violates Equal Protection

1. The Classification Created By New Jersey Must Be Strictly Scrutinized

The purpose of New Jersey's wrongful death statute is to protect, through deterrence, the familial relationships and the lives of those involved, and to compensate for the loss of

companionship resulting from the tortious death of a close family member. *Green v. Bittner*, 424 A.2d 210, 217 (N.J. 1980). The U.S. Supreme Court has stated that the purpose of a wrongful death statute implicates the "intimate, familial relationship between a child and his own mother." *Levy v. Louisiana*, 391 U.S. 68, 71 (1968); See, also, *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972)

(a) The Mothers' Own Equal Protection Rights Are At Stake, and It is Their Actual Loss Which Defines The Classification Under Scrutiny

Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) held that Louisiana violated the Equal Protection Clause by denying a class of mothers claims under its Wrongful Death Statute. The equal protection rights violated were, as here, those of the mother whose child died as the result of tortious conduct. The significance of *Glona* rests in its holding that it is the actual losses sustained by the mothers which define their class and determine whether the plaintiffs are similarly situated to mothers permitted recovery. In *Glona*, Louisiana denied the mother benefit of the Wrongful Death statute because Louisiana created the legal fiction that the mother's child, born out of wedlock, did not exist (a "non-person"). Thus, New Jersey is not free to pretend, for the "purposes" of the Wrongful Death Statute, that the Plaintiff did not in fact incur the actual loss of a "loved one", a fact it acknowledges for the "purposes" of its *Portee* claim. If it were, then the State's creation of a legal fiction would permit the State to treat mothers who are in exactly the same position in relation to the purpose of a given statute in entirely different ways. The U.S. Supreme Court rejected creation of such fictions in *Glona* where Louisiana argued it could "define" its wrongful death claims as it sees fit by declaring that mothers who lost children did not sustain that loss by declaring a class of human beings "non-persons."

> To say that the test of equal protection should be the "legal" rather than the biological relationship is to avoid the issue, for the Equal Protection Clause necessarily limits the authority of a state to draw such "legal" lines as it chooses . . . [w]here the

> claimant is plainly the mother the state denies equal protection of the laws to withhold relief merely because the child wrongfully killed [was deemed a "nonperson"]. *Glona*, 391 U.S. at 75-76.

Thus, *Glona* made it clear that in defining the classification drawn by the Statute under scrutiny the Court must look to the actual facts, not the State's fictions. In fact, New Jersey has acknowledged that the same mothers who are not permitted recovery under the Wrongful Death Statute whose children are tortuously injured in utero and die in the womb sustain *exactly* the same loss as the mothers who are allowed recovery:

> The *relationships* in this case ["pre-birth" death] are not different and the expectations of the parents *are not distinguishable* [from "post-birth' death cases]. Consequently, *the parental and family interests, and the duty to protect those interests, are the same*. *Giardina*, 545 A.2d at 142 (emphasis added).

(b) Only a Compelling State Interest can Justify the Discriminatory Classification

(i) Imposition of Strict Scrutiny

The right of the Plaintiff at issue is that of equality of treatment. It is, therefore, irrelevant whether or not a state is *required* to provide a claim in the first instance. Once the state acts to protect some individuals, it must provide protection to all unless there is a legitimate state interest promoted by the denial to the excluded class. *Harper v. Virginia*, 383 U.S. 663, 665 (1966); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Weber v. Aetna*, supra; *Gomez v. Perez*, 409 U.S. 535 (1973); *Levy v. Louisiana; supra; Glona v. American Guaranty & Liab. Ins. Co., supra; Griffin v. Illinois*, 351 U.S. 12 (1956). Where a benefit is protected by the state, a classification which excludes some individuals from protection of a fundamental interest must be strictly scrutinized. *Harper*, 383 U.S. at 670. *Clark v. Jeter*, 486 U.S. 456, 461 (1988); *Carrington v. Rash*, 380 U.S. 89 (1965). *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Baker v. Carr*, 369 U.S. 186 (1962).

(ii) Plaintiffs Have a Fundamental Liberty Interest in the Relationship With Their Children

The relationship between parents and their children within marriage and the traditional family has always been protected as fundamental. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977); *Santosky v. Kramer*, 455 U.S. 745, 753, 759 (1982). The entitlement to protection of this fundamental right was first declared to be "self-evident" in the *pre-Levy* case of *Meyer v. Nebraska*, 262 U.S. 390 (1922) and reaffirmed in the *post-Levy* cases. *e.g. Lehr v. Robertson*, 463 U.S. 248, 256 (1983). The source of this liberty interest is the intrinsic natural rights which derive by virtue of the existence of the individual. *Smith v. Organization of Foster Families*, 431 U.S. 816, 845 (1977); see also *Moore v. City of East Cleveland, supra*. The Supreme Court has described this as an interest in the "companionship" with one's children. *Santosky*, 455 U.S. at 759; *Lassiter v. Department of Soc. Serv.*, 452 U.S. 18, 27 (1981); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). This is the very interest protected by New Jersey's Wrongful Death Statute. *Green v. Bittner*, 424 A.2d at 215-19.

Stanley v. Illinois, 405 U.S. 645 (1972) held that even fathers of a child born out of wedlock possess a protectable liberty interest in their actual relationships with their children. Subsequent cases made clear that the degree of protection which the interest of a father of a child born out of wedlock enjoyed depended upon the degree of the father's acceptance of his natural duty to his child and the existence of an actual relationship. See and compare, *Quilloin v. Walcott*, 434 U.S. 246, 255-56 (1978), with *Caban v. Moohammed*, 441 U.S. 380, 389, n.7, 392-93, n.14, and *Lehr v. Robertson*, 463 U.S. 248, 253-261 (1983). In contrast to the father of a child born out of wedlock, the mother's interest in her relationship with her child is always protected as fundamental. The majority in *Lehr v. Robertson*, 463 U.S. 248 (1983), adopting much of the reasoning of Justice Stewart's dissent in *Caban*, 441 U.S. at 398-99, and that of Justice Stephens, 441 U.S. at 403-405, emphasized the difference in the father's relationship and that of the mother, noting: *"The mother carries and bears the child, and in this sense her parental relationship is clear." Id* at 259-60; 260, n.16 (emphasis added).

Lehr recognized that the mother has an actual relationship with her child during pregnancy, and the pregnant mother has a protected liberty interest in that relationship.

(iii) Strict Scrutiny and Wrongful Death Statutes

(a) The Framework Established by *Levy*, *Glona* and *Weber*

Levy v. Louisiana, 391 U.S. 68 (1968), *Glona v. American Guaranty*, 391 U.S. 73 (1968), and *Weber v. Aetna*, 406 U.S. 164 (1972) each found Wrongful Death Statutes which excluded subclasses from their protection to violate the Equal Protection Clause. Because the constitutionally protected interests of the mother in her relationship with her child are considered "fundamental" (*Santosky v. Kraemer*, 455 U.S. 745 (1982)), and are implicated by the wrongful death statute (*Levy*, 391 U.S. at 71), the strict scrutiny standard of review must be employed. *Weber*, 406 U.S. at 172-173, 176. *Levy* stated: "The rights asserted here involve the intimate, familial relationship between a child and his own mother." *Levy*, 391 U.S. at 71.

Weber held that because the wrongful death portion of Louisiana's worker's compensation statute implicated personal interests it must be subjected to strict scrutiny.

> [W]hen state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. [citations omitted]. 406 U.S. at 172-73. Whatever the merits elsewhere of this contention [promoting the state's interest in protecting "legitimate family relationships"], it is not compelling in a statutory compensation scheme . . . [for the death of a family member]" 406 U.S. at 173. ". . . the classification is justified by no legitimate state interest compelling or otherwise." *Id* at 176.

Levy and *Glona* did not expressly state they imposed strict scrutiny. The litigants in those cases did not argue that strict scrutiny should be imposed, and the Supreme Court had not yet expressly held that the relationship between a parent and an illegitimate child enjoys protection under the Due Process Clause. However, it is clear that the holdings in *Levy* and *Glona* were significantly influenced by the fact that the wrongful

death statute implicated the protectable liberty interest in the relationship between mother and child. A year before *Weber*, the Supreme Court upheld a statute in *Labine v. Vincent*, 401 U.S. 532 (1971), which excluded a class of illegitimate children from recovering under intestacy laws. In distinguishing *Levy* and *Glona* from *Labine*, the *Weber* Court relied exclusively upon the purposes of the different statutes and the different interests which those statutes sought to protect. The familial interests in the relationship between close family members protected by the wrongful death statute (*Glona* and *Levy*) and the wrongful death compensation statute (*Weber*) were not involved in *Labine* even though the class of illegitimates discriminated against were the same. *Weber*, at 170-74. Four years after *Levy*, when faced with a state termination of the relationship between a parent and his illegitimate child the Court cited *Levy* and *Glona* as authority which established that the relationship between the parent and the illegitimate child was protected by Due Process. *Stanley v. Illinois*, 405 U.S. 645, 651-52 (1972). *Weber* emphasized the nature of the loss to the survivors involved (406 U.S. at 169-174), as did *Levy* (391 U.S. at 71).

Weber's reasoning for imposing strict scrutiny has elements which are unique to equal protection analysis in cases where the state undertakes to directly protect fundamental interests by creating a cause of action in tort. The primary purpose of the Wrongful Death Statute is to deter conduct which adversely affects the fundamental interests of both mother and child. The existence of the statutory cause of action is attributable to New Jersey's recognition that the law influences private conduct and positively affects the fundamental rights it seeks to protect. *Cowan v. Doering*, 545 A.2d 159, 167 (N.J. 1988); *Weinberg v. Dinger*, 524 A.2d 366, 375 (N.J. 1987); *People Express v. Conrail*, 495 A.2d 107, 111 (N.J. 1985).

Weber's imposition of strict scrutiny is consistent with other Supreme Court cases which recognize that: [1] once a state extends a benefit to those within its borders which implicates fundamental rights, it can justify excluding some individuals from that benefit only if the classification promotes

a compelling state interest[3] and [2] where a state statute excludes some persons from a benefit which is not itself a "fundamental right", but the act of excluding a particular class of individuals influences private conduct which affects a fundamental right, only a compelling state interest can justify the classification.[4]

Nowhere is the denial of protection of the mother's fundamental interests more egregious than where a mother contemplating abortion is denied informed consent by a doctor who performs an abortion which wrongfully terminates her rights and she is denied the protection of the law. The mother to whom abortion is proposed is involved in a decision of whether to waive or exercise her fundamental rights in her relationship with her child. That substantive right includes the requirement that any waiver of it be informed, knowing and voluntary. e.g. *Johnson v. Zerbst*, 704 U.S. 408, 464-65 (1978); *Brady v. United States*, 379 U.S. 742, 740 (1970). When the waiver of her fundamental right is unknowing, uninformed or involuntary because of the doctor's breach of duty, the conduct of the doctor uniquely and directly affects the mother's relationship by deliberately terminating it. The doctor's conduct deprives the mother of the ability to make any meaningful decision about her relationship. Unlike virtually every other tortfeasor, the abortion doctor knows exactly the nature and extent of the loss the mother will sustain. It was his plan to terminate her rights.

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3. See, e.g. *Harper v. Virginia*, 383 U.S. 663 (1966) (the state was not required to create a particular right to vote, but once it did, the state was required to extend the right to all, absent a compelling state interest); *see also Kramer v. Union Free Sch. Dist.*, 395 U.S. 21 (1969); *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970). For cases involving free speech, *see Carey v. Brown*, 447 U.S. 453 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972).

4. See, e.g. *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirement in order to receive welfare benefits (to which one has no right) negatively impacts fundamental right to travel). *See also Mem. Hospital v. Maricopa County*, 415 U.S. 250(1974), and *Dunn v. Blumstein*, 405 U.S. 330, 338-42 (1972). In this latter line of cases, strict scrutiny is imposed because the statute may deter private travel. "But, even if travel is not deterred, strict scrutiny is imposed because the act of travel" is "penalized" in the sense that the traveler does not receive a benefit others receive, even though he has no "right" to the benefit. *See Dunn*, 405 U.S. at 338-42.

(b) The Reasoning of *Alexander v. Whitman* Does Not Apply to This Case

Alexander v. Whitman, 114 F. 3d 1392 (1997) upheld New Jersey's Wrongful Death Statute against a facial attack brought on equal protection grounds. *Id.* at 1406-1408. However, *Alexander* is in direct conflict with controlling precedent of the U.S. Supreme Court, and its reasoning is inapplicable to the equal protection violation which occurs when the wrongful death statute is applied to the tortious conduct of an abortion doctor who terminates the rights of a mother without an informed, knowing and voluntary waiver. Totally ignoring the precedent in *Levy, Glona, Weber* and *Stanley, Alexander* argued that the New Jersey Wrongful Death Statute should not be strictly scrutinized because the relationship between a mother and her child she carried was "not affected" by New Jersey's denial of the protection of the wrongful death statute. *Alexander*, at 1403-1404; 1407. In arguing that "New Jersey statutes at issue here do not affect [the] relationship [of a mother] with her unborn child" (*Id* at 1404), *Alexander* examined only whether the inability to make the claim could have "affected" the mother's decisions about her relationship. *Alexander*, at 1404.

First, whatever merit this reasoning may have in the facial attack on the statute which *Alexander* dealt with, it has no application in this case where the attack is on the validity of the statute when it is applied to deny protection and recovery for a mother whose fundamental interest is terminated because of the misrepresentation of a doctor, who misleads the mother when she is making a decision of whether or not to terminate her relationship with her child.

Thus, the denial of a Wrongful Death claim to the plaintiffs doesn't just deny equal treatment by denying recovery after the tortious conduct, which standing alone constitutes an equal protection violation. (*Levy, supra; Glona, supra; Weber, supra*). It actually promotes negligence of abortion doctors by immunizing them from liability when they fail to obtain informed voluntary consent for a procedure which is intended to terminate the mother's rights. When the very decision the mother is making involves the waiver of her fundamental

interest in her relationship, and a doctor terminates that relationship after denying the mother of an informed voluntary decision, the creation of immunity for the doctor directly affects her relationship. It terminates it.

Second, *Alexander's* reasoning was actually advanced under a due process analysis, and is irrelevant to equal protection scrutiny of a statute which has as its purpose the protection of the fundamental interest of the mother's relationship by deterring conduct of third parties which adversely affects that relationship.

The purpose of any cause of action in tort isn't advanced by an attempt to influence the conduct of the potential *victims* as suggested by *Alexander*. The law aims to influence the conduct of the potential tortfeasors. *Alexander* ignores the primary purpose of New Jersey Tort Law, to protect the health, lives and relationships of individuals by deterring third parties from engaging in tortious conduct. *Cowan v. Doering*, 545 A.2d 159, 167 (N.J. 1988); *Weinberg v. Dinger*, 524 A.2d 366, 375 (N.J. 1987); *People Express v. Conrail*, 495 A.2d 107, 111 (N.J. 1985). A mother, such as that in *Glona*, who is allowed to pursue a negligence claim against an automobile driver who kills her ten year old child is not allowed to do so because she gave birth in reliance upon the future availability of a Wrongful Death claim. This is one of the lessons of *Levy*, *Glona* and *Weber*. None of the plaintiffs in those cases ordered their relationships in reliance upon the availability of recovery in wrongful death. The fact that a class of mothers in *Glona* was denied compensation for the loss of the familial relationship was found offensive to equal protection. *Weber* imposed strict scrutiny even where the mother's decision making was not involved, because the benefit of the statute involved the familial relationship.

Third, *Alexander* is in direct conflict with *Weber v. Aetna*, 406 U.S. 164 (1972) which imposed strict scrutiny, as well as *Levy v. Louisiana*, 391 U.S. 68 (1968) and *Glona v. Amer. Guar.*, 391 U.S. 73 (1968), which expressly recognized that Wrongful Death Statutes involved the familial relationship of mother and child. *Alexander* did not attempt to reconcile its statements with *Weber*, *Levy* or *Glona* because it failed to mention or

analyze them in its equal protection analysis. *See*, 114 F.3d at 1406-1408. *Alexander* admitted that *Weber* applied "heightened scrutiny", but declined to follow *Weber*, incorrectly asserting that the reason for Weber's imposition of strict scrutiny was because the classification of persons based upon "illegitimacy" required it. *Id* at 1404-1405. *Alexander* ignored the clear language of *Weber*, *Levy*, and *Glona*.

Levy leaves no doubt that the Court relied upon the existence of an actual mother-child relationship and how it related to the purpose of the wrongful death statute.

> [W]e have been extremely sensitive when it comes to basic civil rights [citations omitted] and have not hesitated to strike down an insidious classification even though it had history and tradition on its side. [citations omitted]. The rights asserted here involve the intimate, familial relationship between a child and his own mother. *Levy* 391 U.S. at 71.

Levy held that the reasonableness of the classification depends upon its relationship to the purpose of the statute. "Legitimizing or illegitimizing of birth has no relationship to the nature of the wrong allegedly inflicted on the mother." *Levy*, at 72; See, also, *Weber*, at 168 (*Levy* "decided that the fact of a child's birth out of wedlock bore no reasonable relation to the purpose of wrongful death statutes"). Nothing in *Levy* suggests that the court considered the classification itself as suspect. In *Glona*, the classification involved was that of mothers who lost children born out of wedlock, clearly a class which did not require heightened scrutiny, yet the statute was held to be in violation of the mothers' equal protection rights. *Glona* found no relationship between the discriminatory class and the purpose of the statute because the statute's purpose is to protect against, and provide compensation for, the loss of the mother-child relationship. *Glona* at 75. *Stanley v. Illinois*, 405 U.S. 645, 651-652 (1972) makes it clear that *Levy* and *Glona* was most influenced by the involvement of the relationship of mother and child, *Stanley* pointing out that *Levy* and *Glona* declared a Wrongful Death statute unconstitutional:

> "because familial bonds in such cases (between mother and illegitimate child) were often as warm,

> enduring, and important as arising within a more formally organized family unit. *Levy v. Louisiana*, 391 U.S. 68, 71-72 . . . 'To say that the test of Equal Protection should be the 'legal' rather than the biological relationship is to avoid the issue for the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses'. *Glona v. American Gua. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1986)."

Stanley, referring to *Levy* and *Glona*, concluded that "These authorities make it clear that, at the least, *Stanley's* interest in retaining custody of his children is cognizable and substantial." *Stanley*, at 651-652.

Weber, decided three weeks after *Stanley*, held that because the wrongful death portion of Louisiana's workman's compensation statute implicated "personal rights" it must be subjected to strict scrutiny. *Id*, at 173. Nowhere does *Weber* suggest that the court was creating a suspect classification. To the contrary, the court distinguished *Labine v. Vincent*, 401 U.S. 532 (1971) decided a year earlier in which statutes discriminating against a class of illegitimate children were upheld. In *Mathews v. Lucas*, 427 U.S. 495 (1976), the Court specifically rejected an argument that a classification based upon illegitimacy should enjoy heightened scrutiny, stating the rational basis test employed by *Labine* should be employed. *Id.* at 504-506. The classification of illegitimates in *Labine* and *Mathews* was the same as that in *Levy*, *Glona* and *Weber*. In both instances the cases were distinguishable because the statutes did not directly involve the interests in the parent-child relationship.[5]

In *Parham v. Hughes*, 441 U.S. 347 (1979). In *Parham* a statute which excluded fathers of illegitimate children who did not legitimize their children from the benefits and protection of

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5. In 1983, because of the continued deliberate discrimination against children born out of wedlock the Court did later develop a heightened scrutiny for the class of illegitimate children but not for the class of their mothers. *Pickett v. Brown*, 462 U.S. 1, 8 (1983). By that time the Court had entertained eleven cases involving discrimination based upon illegitimacy. In 1988 the Court referred to the standard as "intermediate scrutiny". *Clark v. Jeter*, 486 U.S. 456, 461 (1988).

Georgia's wrongful death statute was upheld. The comparison of *Parham* with *Glona* illustrates and establishes that the equal protection analysis in *Glona* turns upon the existence and nature of the relationship of the parent and child as one protected by due process. *Parham* upheld the statute on the basis that the state had "an interest in promoting a legitimate family unit; and an interest in setting the standard of morality by not according to the father of an illegitimate child the statutory right to sue for the child's death." *Id.* at 349-50. In *Glona*, the Court held that the same interest bore no relationship to the purpose of the statute and could not justify the discriminatory classification that barred the mother's recovery. The difference in the results in *Glona* and *Parham* reflects the fact the Court employed different standards of scrutiny and the differences between the relationships involved. The fact that the child in *Glona* was illegitimate does not explain the difference in treatment because the rights involved were the equal protection rights of the parents in *Parham* and *Glona*, not the rights of the children. Moreover, the children were illegitimate in both instances. The reason for the Court to employ a different standard of scrutiny is easily explained. In *Glona*, the relationship of the mother and child was an existing mother-child relationship, one which enjoys the greatest constitutional protection, and the relationship was the kind of relationship the statute sought to protect. It is clear that the weakness of the relationship of the illegitimate's father in *Parham* adversely affected both his standing with respect to the class of persons the wrongful death statute was intended to protect and the degree of protection his liberty interest enjoyed under Due Process.

> The invidious discrimination perceived in that case (*Glona*) was between married and unmarried mothers. . . . the statute in *Glona* excluded every mother of an illegitimate child from bringing a wrongful death action while the Georgia statute at issue here excludes only those fathers who have not legitimated their children . . . *Parham*, 441 U.S. at 356, n.7.

2. New Jersey Has No State Interest, Either Compelling or Rational, Which Is Promoted by the Classification

(a) Where the Death Occurs Is Irrelevant to the Purpose of the Statute

The interests served by the statute is the State's interest in protecting the mother's relationship with her child (*Green v. Bittner*, 424 A.2d 210 (1980); *Volk v. Baldazo*, 651 P.2d 11, 15 (Id. 1982); *Dunn v. Roseway, Inc.*, 333 N.W. 2d 830, 833 (Iowa 1983); *Farley v. Sartin*, 466 S.E. 2d 528 (W. Va. 1995); *Espardere v. Feld*, 649 F. Supp. 1483 (D. Colo. 1986); *Gentry v. Gilmore*, 612 So. 2d 1241, 1245 (Ala. 1993); see also, Stuart M. Speiser, *Recovery for Wrongful Death*, § 3.47 n.90 at 317, § 3.53 at 336 (Lawyers Co-op, 2d 3d. 1975)), and the protection of the lives of human beings. (*See* p. 15-16; 29; 6-7; *supra*); *Green v. Bittner, supra.*; *Farley v. Sartin*, 466 S.E.2d at 531; *Espardere v. Feld*, 649 F. Supp. at 1483; *Volk v. Baldazo*, 651 P.2d at 15. The creation of the wrongful death cause of action was the method New Jersey chose to protect these legitimate interests. The State defines the cause of action by establishing the elements of the claim which must be proven. These elements define the limits on the claim. The essential elements of the wrongful death claim are that: (1) the plaintiff can establish tortious conduct on the part of the defendant; (2) that conduct caused injury of one who could have, if he lived, brought a claim against the defendant; (3) the injury caused by the defendant resulted in death; and (4) the plaintiff has the kind of familial relationship with the decedent required by the statute. Plaintiffs can prove all of the elements of the claim.

The *issue before the Court was how does the exclusion from liability of a tortfeasor's conduct which results in the death of the child in utero promote the purpose of the statute which is intended to deter that very conduct*? *Weber v. Aetna*, 406 U.S. at 172-73, 175; *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Levy v. Louisiana, supra*; *Griffin v. Illinois*, 351 U.S. 12 (1956). If a mother's child was injured at a particular time in utero and the injury causes death, where her child's death occurs does not affect the nature of her loss. It is the very same child, same unique person in fact, whose injury and death occurs at the

very same age as a result of the very same tortious conduct. Her loss is exactly the same. What *Alexander* suggests is the statute's "limitation" is nothing more than a creation of a subclass of those who can prove every element of the claim who are expressly excluded from the protection of the statute for no valid reason. The State's irrational declaration that plaintiffs' children never existed does not constitute a "state interest" promoted by the classification. Rather it is the pointless demarcation line which draws an improper subclassification. *Weber* has particular relevance here:

> The inferior classifications of [illegitimate children] bears, in this instance, no significant relationship to those recognized purposes of recovery which workmen's compensation statutes commendably serve. *Weber*, 406 U.S. at 175.

As *Weber* makes clear, the discriminatory classification, and those who fall within it, must be compared to the classification with respect to the purposes of the statute. Tussman and tenBroek, *The Equal Protection of the Laws*, 57 Cal. L. Rev. 341 (1949). Here, plaintiffs' claims were excluded as the result of the very tortious act for which the State otherwise authorizes compensation. *It was the act of the tortfeasors themselves which caused the child's death.* The classification therefore defeats the very purpose of the law.

(b) There is No Legitimate State Interest Promoted by the Discriminatory Classification

There isn't a single legitimate interest of the State, let alone a compelling one, which is in any way promoted by the discriminatory classification. This fact is born out by careful scrutiny of the Third Circuit opinion in *Alexander v. Whitman*, 114 F.3d 1392 (1997), which identified only one alleged "state interest" promoted by the wrongful death statute: New Jersey's "interest in defining who is entitled to recover for injuries and in setting limits on tort recovery for wrongful death." *Alexander*, at 1406, 1408. *Alexander* asserted that by creating the discriminatory sub-class of mothers this interest is promoted because the classification "eliminates the nearly impossible problems of proof inherent" in proving "injuries" to a "fetus". Id. At 1405.

(i) The Classification does not Promote the State Interest Identified by *Alexander* as the Statute is Applied in this Case

It is impossible to reconcile *Alexander's* statement that the reason for the discriminatory classification concerns the difficulty of proving the injury and death of a child in utero with New Jersey's controlling case law. *Smith v. Brennan*, 157 A. 2d 497 (N.J. 1960) expressly rejected the argument that proof of injuries which occur in utero is too difficult to allow recovery for those injuries. *Id.* at 503. Those proofs are routinely introduced in New Jersey Courts and a wrongful death claim may be brought when an injury to a "fetus" in utero results in death. *Carey v. Lovett*, 622 A.2d 1279 (1993). *Alexander* conflicts with *Giardina v. Bennett*, 540 A.2d 139, 143 (1988), which created a common law claim for emotional distress and permits proof that the defendant tortiously caused injury and death of a "fetus" in utero. In that emotional distress claim the plaintiff is allowed to introduce *exactly* the same evidence necessary to prove the injury and cause of death for the wrongful death in a pre-birth death case. Unquestionably, if plaintiff proves the basis for liability for an Emotional Distress claim due to the death of the child in utero, plaintiff will have, by necessity, produced all of the proof necessary for liability in the wrongful death claim. *Giardina* expressly stated that "difficulty of proof" concerning damages is not the reason for the discriminatory classification:

> We note that under *Smith, supra*, a child may recover for tortiously inflicted prenatal injuries, and find that this satisfies the requirement limiting recovery to situations where the decedent's death was one " such as would, if death had not ensued, have entitled the person injured to maintain an action for damages, resulting from injury." *Giardina*, at 146, n.2. Our reasons for not adopting a more expansive interpretation of the statutory term "persons" in this context *do not relate to the speculative nature of damages* that would occur if fetal death

> qualified as any actionable wrongful death under the act. *Giardina*, at 147 (emphasis added).

The reasoning of *Alexander* is not only unpersuasive, it is disingenuous. The fact that the State allows the same proofs in other contexts is a concession by the State that problems of proof are not overwhelming, and the U.S. Supreme Court has held in such circumstances that "problems of proof" can not be used as an excuse to discriminate against a particular class of litigants. *Clark v. Jeter*, 486 U.S. at 462-465; See also, *Pickett v. Brown*, 462 U.S. 1, 10-11 (1983). "Problems of proof cannot justify an impenetrable barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). There simply are no "problems of proof" where the injury and death of the child occur in utero as a result of an abortion. The doctor who performs an abortion intends to terminate the life of the child, and acts on that intent. It is indisputable what and who caused the child's injury and death.

(ii) The "Interest" Identified by *Alexander* is not a Legitimate State Interest, and *Alexander* is in Direct Conflict with *Glona*

Alexander, in direct conflict with *Glona v. American Guar. & Liab. Ins. Co.*, 391 U.S. 73, 75-76 (1968), identified the state interest promoted by the discriminatory classification as follows:

> ". . . the (New Jersey) legislature defined the wrongful death action with *the intent of limiting it to the class of people considered persons by the common law.* As noted earlier, the New Jersey legislature was doing nothing more than setting limits on tort recovery . . ." *Alexander*, at 1408. (emphasis added); that is, New Jersey's "interest in defining who is entitled to recover for injuries and in setting limits on tort recovery for wrongful death." *Id* at 1406.

What *Alexander* asserts as an "interest" of the state isn't a legitimate interest at all. It cannot be said that the state has an interest in defining a claim without identifying the

interests protected by that claim- that is, the purposes for which it is created. To do so is to say that the state has an arbitrary interest in drawing lines as an end in itself. If that were so the state could discriminate against any class of person in fact by stating that it doesn't consider them persons in law and such discrimination would always be constitutional because the state is just "defining who is entitled to recover for injury". This was *exactly* the argument of *Louisiana* which *Glona* rejected. *Id* at 75-76. *Alexander* stated:

> "Absent the limitations in these statutes, it would be difficult, if not impossible, to prohibit a Wrongful Death or Survival Action no matter how early the fetus was in its development". *Alexander*, at 1406.

This begs the question. The State's desire to prevent claims for mothers of children who die in utero must have a valid purpose. All this statement of *Alexander* says is that New Jersey cannot effectuate its discrimination without creating the classification. That classification is unconstitutional if its purpose is to arbitrarily exclude a class of mothers, who can prove every element of the claim, just for the sake of doing so. See, e.g. *Glona v. Aetna*, at 75-76.

For a classification to have a rational basis, it must promote the purpose of the statute. *Weber v. Aetna*, 406 U.S. 164, 175 (1972). "A statutory discrimination must be based on differences that are reasonably related to the purposes of the act in which it is found." *Morey v Doud*, 354 U.S. 457, 465 (1957); see also, *Colorado & Santa Fe R. Co. v. Ellis*, 165 U.S. 150, 155 (1897); *Dandridge v. Williams*, 397 U.S. 471, 519 (1970) (Brennan, J., dissenting). The interest of the state advanced by the wrongful death statute is New Jersey's interest in protecting the mother's relationship with her child and protecting life. The interest of the state in creating a particular claim is inextricably connected to the purpose of the statute because protection of that interest *is* the purpose of the statute.

II. New Jersey Denies The Pregnant Mothers In The Petitioners' Class Protection Of Its Civil Laws Which Are Designed To Protect Against Involuntary And Uninformed Waiver Of Their Fundamental Rights, Protection Afforded All Other Pregnant Mothers

Counts VIII and IX of the Complaint set forth an Equal Protection violation because New Jersey denied the plaintiffs the affirmative protection of their fundamental interest in their relationship with their children which is afforded all other mothers similarly situated. ¶ 133, 135 at A126, A130. This claim was supported by detailed allegations of fact. In short, New Jersey required counseling to pregnant mothers in other contexts, such as adoption, that treats the mother's waiver of her rights as a last option. The law guards against involuntary and uninformed waiver of the mother's rights. (¶40-42 at Pa 70, 71; ¶121-131 at Pa 121 to Pa 126). In contrast, all of the counseling required in those other contexts are not required of abortion doctors who routinely fail to provide reasonable information which can assist a pregnant mother to acquire even a small level of appreciation of material facts necessary to make an informed decision because they do not provide any counseling, do not disclose factual information about the true nature of the procedure, do not let them see their child's live image on a sonogram, do not let them hear their child's heartbeat, and routinely misrepresent facts (¶32 at A65, 66); nor do the doctors inform the mothers of medical risks to themselves, or advise the mothers that their unborn child may experience pain (¶29 to 30 at A64, 65). Mothers contemplating waiver of their fundamental interest by consulting an abortion doctor are denied all protection and the state requires no counseling or information to help the mother make an informed decision; and the state takes no action to help insure that the decision is voluntary (¶128 to 131 at A124 to 126). New Jersey law is well established. The District Court and the Third Circuit ignored this clear Equal Protection violation.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED DECEMBER 24, 2002

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 01-1068 & 01-1461

DONNA S. MARIE, (a fictitious name of a real individual), individually, on her own behalf, and on behalf of all women similarly situated; Donna Santa Marie, on behalf of her own child and all others similarly situated; TERESA H. JIMENEZ, on behalf of herself and on behalf of her patients [both mothers carrying children and the children themselves], and all other children similarly situated; JANE JONES, (a fictitious name of a real individual), individually, on her own behalf, and on behalf of all women similarly situated; JANE JONES, on behalf of her own child and all other individuals similarly situated; MARY DOE, (a fictitious name of a real individual), individually, on her own behalf, and on behalf of all women similarly situated; MARY DOE, on behalf of her own child and all other individuals similarly situated; MYRANA GUERRA-DELUNA, M.D., on behalf of herself, and on behalf of her patients [both mothers carrying children and the children themselves] and all women and children similarly situated,

Appellants

v.

* JAMES E. McGREEVEY, Governor of the State of New Jersey in his official capacity; MEMBERS OF THE NEW

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* Amended per Court order dated 11/6/02.

Appendix A

JERSEY BOARD OF MEDICAL EXAMINERS; JOSEPH GLUCK; JUDITH I. GLEASON; VERONICA E. DESMOND; GLENN A. FARRELL; DANIEL WEISS; ARTHUR W. PERRY, M.D.; BERNARD ROBINS, M.D.; MICHAEL T. CHEN, M.D.; KAREN C. CRISS, C.N.M.; ARGANEY L. LUCAS, JR., M.D.; CLIFTON LACY, M.D.; BASSAM HADDAD, M.D.; DONALD C. HUSTON, JR., D.O.; WILLIAM V. HARRER, M.D.; GHIAS MOUSSA, M.D.; GREGORY J. ROKOSZ, D.O.; JAMES C. RICKETTI, D.P.M.; MANMOHAN PATEL, M.D.; KEVIN P. WALSH; KELLY REID, M.D.; EDWIN TRAYNER, M.D.; DAVID WALLACE, M.D., in their capacity as members of the New Jersey Board of Medical Examiners, and their successors in office; JOSEPH P. BRENNAN, JR., Surrogate Essex County; DIANE GEROFSKY, Surrogate of Mercer County; KEVIN J. HOAGLAND, Surrogate of Middlesex County; DAVID SAMSON, Attorney General of the State of New Jersey, in his official capacity and his successors in office

On Appeal from the United States District Court
for the District of New Jersey
D.C. Civil Action No. 99-cv-02692
(Honorable Garrett E. Brown, Jr.)

Argued June 24, 2002

Before: SCIRICA, BARRY and WEIS, *Circuit Judges*

(Filed: December 24, 2002)

Appendix A

OPINION OF THE COURT

PER CURIAM.

In this constitutional challenge, certain women who have had abortions allegedly without giving informed consent contend that denial of their right to recover damages under New Jersey's Wrongful Death Act violates the Equal Protection and Due Process clauses of the Fourteenth Amendment. We have previously rejected such a claim, *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997), and accordingly will affirm the District Court's dismissal under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs may have legal recourse in the nature of a damages claim under New Jersey law, an issue they have not raised here.

I.

The principal plaintiffs are women who have had abortions in New Jersey allegedly without their informed consent. They seek to sue their doctors for purported wrongful abortions under the New Jersey Wrongful Death Act, N.J. Stat. Ann. § 2A:31-1. They contend that in not permitting recovery of damages for the wrongful death of a fetus in the womb, the New Jersey law violates their equal protection rights. They also contend that New Jersey law, in failing to require what plaintiffs view as adequate consent, and in "affirmatively protecting" doctors who perform abortions, violates the equal protection and due process rights of women who have had abortions.

Two obstetricians are also named plaintiffs. They claim direct damages and seek third-party standing to represent the interests of their patients. Their direct claims are unclear, but appear to be primarily in the nature of lost business due to their refusal to offer abortion-related services, and due to the early termination of their patients' pregnancies. Because the doctor's claims are ultimately derivative of the violations alleged by the mother plaintiffs, we will direct our attention to the women's claims.[1]

Defendants are New Jersey state and county officials and members of the New Jersey State Board of Medical Examiners.

Each of the women plaintiffs contends she had an abortion without fully understanding the nature of the procedure. At least one plaintiff claims to have been threatened and coerced into having an abortion. Because this is an appeal of a dismissal under Rule 12(b)(6), we must accept plaintiffs' allegations as true. *Bd. of Trs. of Teamsters Local 863 Pension Fund v. Foodtown, Inc.*, 296 F.3d 164, 168 (3d Cir. 2002). These allegations would seem to give rise to certain state-law causes of action. Women who believe they submitted to abortions without informed consent may be able to sue for damages under New Jersey law. *See Acuna v. Turkish*, 808 A.2d 149 (N.J. Super. Ct. App. Div. 2002). But plaintiffs here assert only federal constitutional claims under the equal protection and due process clauses, and under 42 U.S.C. §§ 1983 & 1988.

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1. Plaintiffs also seek class certification of individuals similarly situated to both groups of named plaintiffs. The District Court dismissed plaintiffs' complaint without reaching this issue.

Appendix A

II.

a.

Plaintiffs' central argument is that the women have been discriminated against in being denied the ability to recover damages in a wrongful death action on behalf of their aborted fetuses under New Jersey law.[2] This challenge is precluded by our opinion in *Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997).

The wrongful death action is a creation of statute.[3] It permits certain persons—generally family members—to bring a tort action against a person who tortiously caused the death of another. Wrongful death is "in essence

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2. In the district court, plaintiffs raised a parallel argument under the New Jersey survival law, but in this court have focused their arguments on wrongful death. The issues at stake appear to be the same in both instances.

3. The New Jersey Wrongful Death Act provides:

> When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

N.J. Stat. Ann. § 2A:31-1.

. . . a derivative action based on the harm done to the decedent, and is thus differentiated from personal injury actions brought by the decedent prior to death, or by survivors resulting from injuries they directly suffered due to the wrongful death." *Giardina v. Bennet*, 545 A.2d 139, 145 (N.J. 1988).

The derivative nature of the cause of action requires an assessment of the rights of the "person injured." N.J. Stat. Ann. § 2A:31-1. The New Jersey Supreme Court has ruled that fetuses are not persons for purposes of this statute, so they cannot be "person[s] injured." *Giardina*, 545 A.2d at 143. It necessarily follows that their parents cannot recover under the statute on their behalf. "[T]he Wrongful Death Act does not permit recovery attributable to the wrongful death of an infant before birth." *Giardina*, 545 A.2d at 139; *Acuna*, 808 A.2d at 151 (no wrongful death action for abortion without consent). A parent may, however, recover for the wrongful death of a child who is injured prenatally, and dies from those injuries after birth. *Giardina*, 545 A.2d at 146 n.2 (following *Smith v. Brennan*, 157 A.2d 497 (N.J. 1960)).

Under *Giardina*, fetuses are not "persons" for purposes of the Wrongful Death Act. Therefore, plaintiffs are unable to recover under the Wrongful Death Act on behalf of their fetuses, even if they were wrongfully aborted. 545 A.2d at 143. But parents may still have a cause of action. In *Giardina*, the court expressly recognized "a valid cause of action for the emotional injuries suffered by parents in this kind of a case." *Id.* at 143; *see also Acuna*, 808 A.2d at 155-56 (recognizing *Giardina* action for wrongful abortions). The

parents' own loss, therefore, may be compensable, but they are precluded under New Jersey law from bringing a derivative wrongful death action on behalf of their fetuses.

Plaintiffs contend the distinction between fetuses injured in the womb who die before birth (including aborted fetuses), and fetuses injured in the womb who die after live birth, violates the Equal Protection Clause of the Fourteenth Amendment. They do not argue the statute violated the equal protection rights of the fetuses, because "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn." *Roe v. Wade*, 410 U.S. 113, 158 (1973). The Supreme Court has held the unborn do not have rights under the Equal Protection Clause. *Id.* Instead, plaintiffs contend the statute impermissibly treats mothers of live-born babies and mothers of aborted fetuses as separate classes. In other words, mothers of fetuses that do not survive birth, including aborted fetuses, are unjustly discriminated against.

This general argument was made in—and rejected by—this court previously. In *Alexander*, plaintiffs challenged the New Jersey Wrongful Death Act on essentially the same grounds. That case involved not abortion, but alleged negligence that led to a stillbirth. Plaintiffs' central contention, however, is the same and they repeat many of the same arguments rejected in *Alexander*. We held in *Alexander* that New Jersey's Wrongful Death Act did not, as a general matter, violate the Equal Protection Clause by classifying women according to whether their children survived birth. 114 F.3d at 1408. That holding is dispositive here.

Appendix A

In *Alexander* and again here, plaintiffs assert that the challenged classification must be assessed under a strict scrutiny standard,[4] because it involves fundamental parental

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4. The Supreme Court has stated that "classifications affecting fundamental rights are given the most exacting scrutiny." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (citation omitted); *see also Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 672 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965); *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Baker v. Carr*, 369 U.S. 186 (1962). But it is unclear what constitutes a "fundamental right," and what relationship a classification must stand in relation to that right to "affect" it for these purposes.

Plaintiffs contend the proposition that the parent/child relationship is protected by strict scrutiny under the Equal Protection Clause is established by several Supreme Court cases. In *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73 (1968), the Court struck down state wrongful death statutes that conditioned the right of recovery, in part, on the legitimacy of the children involved, either as decedents or as survivors. The Court later struck down a workers' compensation statute that gave lesser rights of recovery to illegitimate children. *Weber v. Aetna Cas. & Sur. Co.*, 406 U.S. 164 (1972). Plaintiffs contend these cases applied strict scrutiny, and did so because of the importance of the relationship between parent and child.

But the Court did not apply strict scrutiny in any of these cases. Instead, the Court applied intermediate scrutiny, and did so because of the issue of illegitimacy, not because of effect on the parent/child relationship itself. *See Clark*, 486 U.S. at 461 ("Between these extremes of rational basis review and strict scrutiny lies a level of intermediate scrutiny, which generally has been applied to discriminatory classifications based on sex or illegitimacy."); (Cont'd)

rights, and cannot be justified by any compelling state interest. But we found that, whether or not strict scrutiny applied to such cases, it did not apply there, because "[i]t is not the relationship that is affected . . . , it is the ability to recover for the loss of that relationship." 114 F.3d at 1404.

Plaintiffs contend *Alexander* is distinguishable because it involved a negligence claim rather than an intentional wrongful act on the part of the doctor who performed the abortion. But the New Jersey Wrongful Death Act does not affect the parent/child relationship in this case any more than it did in *Alexander*. As the Supreme Court has stated, "It cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is itself a 'fundamental' or constitutional right." *Parham v. Hughes*, 441 U.S. 347, 358 n.1 (1979). In *Alexander*, we considered and rejected plaintiffs' argument that the need to deter wrongful deaths established that parent/child relationships were sufficiently affected. 114 F.3d at 1404. As in *Alexander*, the District Court was correct to apply rational relationship review to the statute. And following *Alexander*, the District Court was correct in finding the classification bears a rational

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(Cont'd)

Alexander, 114 F.3d at 1405 ("[T]he interest at issue in each of those cases was the classification of the child's legitimacy, and the inability of both parent and child to reverse the burdens imposed by illegitimacy.") (internal quotation omitted); *Brian B. v. Pa. Dept. of Ed.*, 51 F. Supp. 2d 611, 621 (E.D. Pa. 1999) (citing *Weber* for the proposition that illegitimacy classifications are subject to intermediate scrutiny). The cases cited by plaintiffs do not support their argument that strict scrutiny should apply.

relationship to a legitimate state interest.[5] The present case, in other words, is governed by our holding in *Alexander*.[6] *See also Acuna*, 808 A.2d at 153 (*Alexander* applied in abortion case).

b.

Plaintiffs also contend their rights were violated by New Jersey law's "affirmative protection" of doctors performing wrongful abortions. They argue these protections violate their equal protection and due process rights. Because this claim, on its face, is more easily understood as a due process claim, we will analyze it as such.

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5. In *Alexander*, we stated, "One cannot seriously argue that New Jersey has no interest in defining who is entitled to recover for injuries and in setting limits on tort recovery for wrongful death." 114 F.3d at 1406. The limits set by New Jersey were justified by problems of proof and the advantages of a bright-line rule. *Id.* These are legitimate interests rationally related to the challenged classification. Furthermore, wrongful death actions are derivative ones focused on the wrong done to the victim.

6. Plaintiffs also contend their equal protection rights were violated because their protections compare unfavorably with parents who have relinquished their parental rights in adoption, under a state scheme that ensures the relinquishment is made knowingly and voluntarily. In both situations, plaintiffs contend the parents' decisions amount to a waiver of their fundamental constitutional right to relationships with their children. New Jersey's failure to provide a similar scheme, they maintain, is unconstitutional. But adoption and abortion are different in several respects, many of which would provide a rational basis for differing consent requirements.

Appendix A

As far as we can tell, plaintiffs' argument is that doctors in New Jersey regularly perform abortions without the informed consent of their patients. Under plaintiffs' view, state law protects these doctors by endorsing a scheme of inadequate consent. Thus, the state acts (in concert with the doctors) to violate women's right to autonomously control their reproduction. This failure to protect women, by protecting wrongful actions by doctors, allegedly amounts to a violation of women's due process rights.[7]

We do not understand plaintiffs to contend New Jersey affirmatively protects doctors who perform abortions without consent, where consent is understood in its ordinary sense. Instead, they contend consent requirements should include informing the pregnant woman that "her child is already in existence," that her fetus is a "complete, separate . . . unique" human being; and that her child, if eight weeks or older, may feel pain. The woman should also be required to view a sonogram and listen to the child's heartbeat, according to plaintiffs.

What is required for consent under New Jersey law is not fully settled. *See Acuna*, 808 A.2d at 157 (declining to "address these perplexing issues" prior to development of

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7. In order to remedy these alleged violations, plaintiffs request: a general declaration that New Jersey's criminal and civil laws protecting abortion rights violate due process and equal protection; a declaration that every human being, including fetuses, "enjoys protection under the Equal Protection Clause of the Fourteenth Amendment"; and entry of an injunction requiring New Jersey regulations to "require the express recognition of the child as a human being," among others.

factual record). In any event, we see no basis for a due process violation. Whatever the particulars of New Jersey law, the Constitution does not require that New Jersey mandate the heightened consent requirements urged by plaintiffs. If plaintiffs believe the informed consent laws in New Jersey are inadequate, they can petition their elected representatives in the New Jersey legislature for redress, or continue to seek relief in the courts under New Jersey law.[8]

For the foregoing reasons, we will affirm the judgment of the District Court.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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8. In *Acuna*, the New Jersey Appellate Division said, "both parties have agreed that it is premature to define what duty of care is owed by a physician in this context. The parties also rightly agree that we should not, at this posture of the case, address the fact-sensitive issues concerning what dangers incident to, or consequences resulting from, such a procedure would be 'material' to the 'prudent patient.' Both parties concur that a resolution of these issues should await a complete factual record." 808 A.2d at 157.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED FEBRUARY 5, 2001 AND FILED FEBRUARY 13, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 99-2692 (GEB)

SANTA MARIE, et. al.,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN, et. al.,

Defendants.

ORDER

This matter comes before the Court upon the Court's notice of call for dismissal pursuant to Fed. R. Civ. P. 4(m) for failure to effect service upon named defendant Peter G. Verniero within 120 days of the filing of plaintiffs' complaint; and

IT APPEARING TO THE COURT that plaintiffs have not produced evidence of service upon Peter G. Verniero; and

IT FURTHER APPEARING TO THE COURT that plaintiffs' complaint as to the individual members of the New

Appendix B

Jersey Board of Medical Examiners was dismissed by this Court's Memorandum Opinion and Order of November 28, 2000; and

IT FURTHER APPEARING that the complete release of all the individual doctors of the Board of Medical Examiners, also terminates plaintiffs' claims against the Board of Medical Examiners. *See McBride v. Minster*, 283 N.J. Super. 471, 498 (Law Div. 1994);

IT IS this 5th day of February, 2001;

ORDERED that plaintiffs' complaint against defendants Peter G. Verniero and the New Jersey Board of Medical Examiners be and hereby is DISMISSED in its entirety; and this case CLOSED.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR. U.S.D.J.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED JANUARY 18, 2001 AND FILED JANUARY 23, 2001

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 99-2692 (GEB)

SANTA MARIE, et. al.,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN, et. al.,

Defendants.

ORDER

This matter comes before the Court upon the Court's Order to Show Cause filed on December 15, 2000 requesting plaintiffs show cause within 20 days why the remainder of plaintiffs' complaint against defendants Joseph P. Brennan, Jr., Diane Gerofsky, and Kevin J. Hoagland, should not be dismissed for the reasons set forth in the Court's Memorandum Opinion and Order filed November 28, 2000; and

IT APPEARING TO THE COURT that plaintiffs have failed to advance any legal arguments against dismissal not already considered by the Court; and

Appendix C

IT FURTHER APPEARING TO THE COURT that plaintiffs are unable to state a claim for relief against the above named defendants for the same reasons expressed in the Court's Memorandum Opinion and Order of November 28, 2000; and for good cause shown;

IT IS this 18th day of January, 2001;

ORDERED that plaintiffs' complaint against defendants Joseph P. Brennan, Jr., Diane Gerofsky, and Kevin J. Hoagland be and hereby is DISMISSED in its entirety.

s/ Garrett E. Brown, Jr.
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX D — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY DATED NOVEMBER 27, 2000 AND FILED NOVEMBER 28, 2000

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 99-2692 (GEB)

DONNA SANTA MARIE, et. al.,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN, et. al.,

Defendants.

MEMORANDUM OPINION

This matter comes before the Court upon the motion of defendants Christine Todd Whitman, et. al. to dismiss plaintiffs' lawsuit for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Also before the Court are plaintiffs' motions for a hearing to determine if an interlocutory order should issue, to file two *amicus briefs* and to admit attorneys *pro hac vice*, as well as plaintiffs' subsequent motion to withdraw Counts Three and Six on behalf of plaintiff Mary Doe. This Court having considered the parties' submissions and for the reasons set forth in this Memorandum Opinion, issued without oral argument pursuant to Fed. R. Civ. P. 78 the Court allows

plaintiffs to withdraw Counts Three and Six on behalf of Mary Doe, and denies plaintiff's requests for a hearing regarding an interlocutory order and for leave to file *amicus briefs* and to admit their attorney's *pro hac vice*. The Court dismisses plaintiffs' complaint in its entirety.

I. BACKGROUND

Plaintiffs filed a ninety-seven page complaint presenting various claims challenging the New Jersey Wrongful Death and Survival statutes under the equal protection and due process clauses of the United States Constitution. The named plaintiffs include three patient-plaintiffs, who have undergone abortion procedures by licensed New Jersey physicians, and their aborted fetuses as well as two physician plaintiffs who decline to terminate pregnancies.

A. Parties

1. Plaintiffs

There are five named plaintiffs in the instant matter. Donna Santa Marie is the fictitious name for a real person, who became pregnant "shortly before her sixteenth birthday." *See* Plaintiffs' First Amended Class Action Complaint (hereinafter "Pls.' Am. Compl.") ¶¶ 2-3. Santa Marie is also the plaintiff in a pending lawsuit filed in the Superior Court of New Jersey in Essex County alleging that she was threatened and coerced into obtaining an abortion. *See id.* Patient plaintiff, Jane Jones, discovered she was pregnant when she was sixteen years old. *See id.* ¶ 24. Jones asserts that the obstetrician told her "she should have a procedure

to 'terminate her pregnancy.' " *Id.* Jane Jones is the plaintiff in a lawsuit pending in the Superior Court of New Jersey in Mercer County against the doctor who performed her abortion, alleging lack of informed consent. *See id.* The final patient plaintiff Mary Doe, alleges that she consented to an abortion only after being told that she would not be terminating the life of a human being. *See id.* ¶ 27. The patient plaintiffs come before the Court on their own behalf, and of all women similarly situated, as well as on behalf of their unborn child and all other unborn children similarly situated. *See id.* ¶ 1.

The first amended complaint also identifies two physician plaintiffs. Teresa Jimenez, M.D. and Myranna Gerra-DeLuna, M.D., are obstetricians licensed to practice medicine in the State of New Jersey. *See id.* ¶ 25. The physician plaintiffs allege that after confirmation of pregnancy, they "treat two separate and distinct human beings as two separate and distinct patients, the mother and child throughout the entire period of gestation." *Id.* The physician plaintiffs assert claims on behalf of themselves, as well as their pregnant and fetal patients. *See id.* ¶ 1.

2. Defendants

The Governor of New Jersey, Christine Todd Whitman, and the Attorney General of New Jersey, John J. Farmer named defendants named in their official capacities. *See id.* at 2. The individual members of the New Jersey Board of Medical Examiners (hereinafter "Board"), are also named as defendants because they have "taken affirmative action

to authorize doctors to violate their duty to their patients."[1] *Id.* ¶ 13. Finally, plaintiffs name Diane Gerofsky, the Surrogate of Mercer County, Joseph P. Brennan, Jr., the Surrogate of Essex County, and Kevin J. Hoagland, the Surrogate of Middlesex County (hereinafter "Surrogate"), for their refusal to, issue Letters of Administration Ad Prosequendum in order for the patient plaintiffs to pursue wrongful death and survival actions on behalf of the fetuses. *See id.* ¶¶ 14, 15, 16.

B. Facts

Plaintiffs fast amended complaint sets out thirteen pages of facts which allege that "[a]s a matter of fact, a child at every age of gestation from conception to full gestation or birth is a complete, separate, unique [and therefore irreplaceable] human being." *Id.* ¶ 17. Plaintiffs also allege "[m]odem medicine treats the mother and child in utero as two separate human beings, that is two separate persons in fact . . . to whom the physician owes a separate professional and legal duty." *Id.* ¶ 19. Plaintiffs assert "a pregnant mother

1. The individual members of the Board of Medical Examiners are: Joseph Gluck, M.D., Judith Gleason, Veronica E. Desmond, Glenn A. Farrell, Daniel Weiss, Arthur W. Perry, M.D., Bernard Robbins, M.D., Richard S. Rhee, M.D., Bennett C. Rothenberg, M.D., Arganey L. Lucas, Jr., M.D., Gary R. Brickner, M.D., Bassam Haddad, M.D., Donald C. Hudson, Jr., D.O., Robert A. Adair, D.O., Ricardo I. Fernandez, D.O., Gregory J. Rokosz, D.O., Christine Danser, Kevin P. Walsh, William V. Harrer, M.D., Janet Levick, D.O., Deborah C. Bradley. Since plaintiff does not assert any particularized claims applicable to specific members of the Board, the individual defendants listed above will be treated collectively as the "Medical Examiners."

has a vital interest in her relationship with her child. That interest is consistent with her child's own interest in his or her life." *Id.* ¶ 29. Further, plaintiffs argue "[t]he performance of an abortion is inconsistent with, repugnant to and destructive of this fundamental interest." *Id.* Plaintiffs also allege that "[a]s a matter of fact, a women [sic] cannot make a truly informed decision whether or not to maintain her fundamental right to her relationship with her child or to waive that fundamental right until after her baby is born alive." *Id.* ¶ 32. They contend that "there are many forms of actual coercion to which a pregnant mother can be subjected which deprives the mother of a voluntary decision concerning whether she will maintain her relationship with her child or whether she will waive her fundamental rights and interests in that relationship." *Id.* ¶ 35. The complaint's statement of facts concludes with plaintiffs allegations regarding the Wrongful Death and Survival statutes on which the lawsuit is based; plaintiffs allege, "Donna Santa Marie, Jane Jones, and Mary Doe and all others similarly situated are entitled to share in the proceeds of the survival action and otherwise has [sic] standing to otherwise act as the general administratrix of the estate of their unborn children." *Id.* ¶ 39

C. Claims

1. Equal Protection Claims

Plaintiffs' claims are set forth in two distinct groups. First plaintiffs assert a claim of "equal protection violations as they relate to New Jersey's denial of the affirmative protection of the plaintiffs' fundamental rights and interests and those of their children — protection afforded others similarly situated." *See id.* at 24. Under this general heading plaintiffs assert two more narrow claims.

Appendix D

a. Wrongful Death and Survival Statutes

First plaintiffs claim "equal protection violations as they relate to New Jersey's Wrongful Death and Survival Action statutes." *Id.* at 25. This heading contains seven counts 1) "Santa Marie — Wrongful Death Statute;" 2) "Jane Jones — Wrongful Death Statute;" 3) "Mary Doe — Wrongful Death Statute;" 4) "Theresa Jimenez, M.D. — Wrongful Death Statute;" 5) "Myranna Guerra-DeLuna, M.D. — Wrongful Death Statute;" 6) "Survival Action — plaintiffs Santa Marie, Jones and Doe;" 7) "Survival Action — Plaintiff [sic] Jimenez and Guerra-DeLuna." *Id.* at 26, 35, 44, 53, 58, 63, 70.

The first two counts are identical in their legal assertions, applying the same allegations to two of the three patient-plaintiffs, Donna Santa Marie, and Jane Jones.[2] Count One alleges "[i]n the tenth week of gestation, as a direct result of the negligence and intentional acts of a physician licensed to practice medicine in the State of New Jersey, who owed Donna and Andrew Santa Marie a duty of care, as well as other health care providers, the plaintiffs' child, Andrew, was caused injury, pain, suffering, and death." *Id.* ¶ 45. It is also claimed that "Joseph P. Brennan, Jr., Surrogate of Essex County, routinely denies requests for the issuance of Letters of Administration ad Prosequendum on the grounds that the baby did not live outside the mother's body following the birth for a moment or any length of time." *Id.* ¶ 46.

Count One also alleges that "as a result of the conduct of those defendants the plaintiff Donna Santa Marie cannot

2. Count Three which asserted the Wrongful Death claim for plaintiff Mary Doe has been withdrawn on the motion of plaintiffs.

establish for purposes of a wrongful death claim brought in the New Jersey Court." *Id.* ¶ 48. According to plaintiffs, this creates an "arbitrary and capricious classification of mothers whose children died in the womb as a result of the tortious conduct of third parties, while permitting claims for other mothers who sustain exactly the same losses [subsequent to the live birth of their children]." *Id.* Plaintiffs claim the "New Jersey wrongful death statute as written and construed deprives Donna Santa Marie and all women similarly situated of the equal protection of the laws and is thus unconstitutional under [the] Equal Protection Clause of the Fourteenth Amendment of the United States Constitution." *Id.* ¶ 55. Plaintiffs claim that the state's failure to recognize a claim for the wrongful death of an aborted fetus "is a violation of the Equal Protection Rights of Andrew Santa Marie." *Id.* ¶ 59. Plaintiffs seek a judgment declaring that the New Jersey Wrongful Death Statute, N.J.S.A. 2A:31-1 to 6, violates the equal protection clause of the United States Constitution. *See id.* at 32. Plaintiffs also seek injunctive relief to prevent the individual surrogates from denying Letters of Administration ad Prosequendum to women whose children died in utero, as well as to require the Board to issue medical guidelines and regulations implementing requirements consistent with plaintiffs views on the beginning of life. *See id.* at 33-34. To that end, plaintiffs would require a pregnant woman to be advised that a child is already in existence and to view the image "of her living child on a sonogram . . . and hear her child's heartbeat." *See id.* at 34. Finally, plaintiffs request the entering of an order requiring the governor and the attorney general of New Jersey to extend the Wrongful Death cause of action to women whose children have died in utero. *See id.*

Appendix D

Count Two applies the same legal allegations as set forth regarding Donna Santa Marie claiming denial of equal protection under the Wrongful Death statute to the facts as they are relevant to plaintiff Jane Jones. *See id.* ¶¶ 60-74. The complaint alleges that after more than eight weeks of pregnancy, Jane Jones's fetus, Mary Jones "was caused injury, pain, suffering and death" as the result of the negligence of the physician who performed her abortion. *See id.* ¶¶ 61, 62. Jane Jones is also the plaintiff in a pending lawsuit in Mercer County assailing the Wrongful Death and Survival statutes, and claiming a lack of informed consent. *See id.* 164. Mercer County Surrogate, Diane Gerofsky "routinely denies requests for the issuance of letters of administration" for children who are not born alive. *See id.* ¶ 65. Count Two makes identical legal assertions as they are detailed above with respect to Count One. Plaintiff Jane Jones requests the same relief sought in Count One. *See id.* at 41-43.

Counts Four and Five apply the Wrongful Death statute to the physician-plaintiffs, Teresa Jimenez, and Myranna Gerra-DeLuna. *See id.* ¶¶ 88-101. Plaintiffs Jimenez and Guerra-DeLuna are licensed physicians specializing in obstetrics. *See id.* ¶¶ 89, 96. Plaintiffs allege that patients of the physician-plaintiffs consult them about abortion services, and they decline to perform such services because of the belief that a woman cannot truly render informed consent to forfeit the mother-child relationship until after she has given birth and has seen her child. *Id.* ¶¶ 90, 97. The physician-plaintiffs allege that some women leave their care to consult with doctors who are amenable to abortion procedures. *See id.* ¶¶ 91, 97. The refusal of the physician-plaintiffs to perform abortion services results in patients requiring such

care to seek out the services of another physician, which plaintiffs allege results in a "direct financial loss." to the physician plaintiffs. *See id.* ¶¶ 92, 99. Plaintiffs allege this "financial loss" grants the physician-plaintiffs standing to challenge New Jersey law on the basis of their patients' rights to equal protection and the alleged violation of that protection imposed by the New Jersey Wrongful Death statute. *See id.* ¶ 93.

Physician-Plaintiffs seek relief similar to the patient-plaintiffs. They request a judgment declaring that their pregnant patients "enjoy an existing relationship between mother and child protected by the Due Process Clause of the Fourteenth Amendment." *See id.* at 60. Plaintiffs also seek a declaration that the New Jersey Wrongful Death statute is unconstitutional because it denies a cause of action to women who elect an abortion "obtained without informed consent or obtained without a voluntary consent." *See id.* The physician-plaintiffs also seek the same injunctive relief requested by the patient-plaintiffs as detailed above. *See id.* at 61-63.

Count Six claims equal protection violations by the New Jersey Survival statute. *See id.* ¶¶ 102-112. Plaintiffs Santa Marie and Jones allege that children who incur injury in utero and are born alive are issued letters of administration in order for surviving family members to assert a survival action as provided for by N.J.S.A. 2A:16-3.[3] *See id.* ¶¶ 103-104. Plaintiffs allege the State of New Jersey violates the due

3. Plaintiff Mary Doe has withdrawn her equal protection claim under the New Jersey Survival Statute in Count Six.

process and equal protection clauses because the "defendants herein have neither a rational basis nor a compelling interest in depriving a class of children of any age from conception to actual birth, who are injured and suffer and experience pain prior to birth as a result of the tortious conduct of third parties from sharing in the protection and benefits of the survival statute." *Id.* ¶ 108. Plaintiffs assert a claim on behalf of a class of children "of all gestational ages from conception to full gestation who die as a result of the tortious conduct of a physician or other health care professionals performing an abortion in those instances where the children's death ensued in their mother's womb." *See id.* ¶ 111. Plaintiffs complain there is "not an adequate remedy at law," for the members of the plaintiffs class. *See id.* ¶ 112.

Plaintiffs Santa Marie and Jones on behalf of their fetuses and all others similarly situated, request declaratory relief recognizing the mother-child relationship as protectable interest and that the aborted fetuses of Santa Mare and Jones were "complete, separate and unique human beings from conception to the time of their death." *Id.* at 67. Further, plaintiffs request a judgment that the New Jersey Survival statute as applied to plaintiffs' class are violative of the equal protection clause. *See id.* Plaintiffs request the identical injunctive relief requested in accordance with the Wrongful Death claim, as detailed above, and request an order requiring New Jersey to recognize the same survival cause of action for women who have chosen to abort their fetuses as is afforded women whose children are tortiously injured in utero and are subsequently born alive. *See id.* at 69.

Appendix D

Count Seven makes the identical claims presented in Count Six on behalf of the purported physician-plaintiffs. *See id.* ¶¶ 113-120. Plaintiffs claim the physician-plaintiffs have standing to raise the claims of pregnant women and their fetuses. *See id.* ¶ 115. Plaintiffs claim that the patients of the doctors are denied the equal protection of the Survival statute "when their children suffer pain and death as the result of the tortious conduct of a physician or other health care professional performing an abortion." *Id.* ¶ 116. The physician-plaintiffs in this claim do not raise any unique claims on behalf of the doctors, but re-state the claims asserted by the patient-plaintiffs in Count Six. Plaintiffs claim they do not have an adequate remedy at law and that a failure to recognize a survival cause of action on behalf of the doctor's patients will "cause irreparable injury to the plaintiffs and their children." *Id.* ¶ 120.

The physician-plaintiffs request the same relief sought by the patient-plaintiffs in Count Six as is detailed above. *See id.* at 72-74.

b. Equal Protection Violations under New Jersey Law

The second point heading begins with general allegations about the nature of the New Jersey statutory scheme which protects the interests of the relationship between a mother and child. *See id.* ¶¶ 121-122. Plaintiffs allege the Wrongful Death and Survival statutes are also designed to protect that interest. *See id.* ¶ 122. Plaintiffs point to the adoption law in New Jersey to illustrate the knowing and voluntariness requirements imposed before a mother can chose to terminate her relationship with her live born child. *See id.* ¶¶ 122-124. Plaintiffs also assert that New Jersey affords affirmative

protection of a mother's interest in the relationship with her child by citing New Jersey criminal homicide statutes and the *parens patrae* doctrine exercised by the state courts. *See id.* ¶¶ 125-126. Plaintiffs allege the state's interest in these matters illustrate the denial of its protection to "a certain class of mothers of which the plaintiffs and their patients are members," namely, mothers who have elected to terminate their fetuses. *See id.* ¶ 128. Plaintiffs assert that "[t]he doctor's proposed solution [of abortion] sanctioned and protected by the state robs the mother of the ability to make an informed decision. The state licenses the doctor to perform the abortion even though termination of the mother's fundamental interests is not informed, is not knowing, and/or voluntary." *Id.* ¶ 128.

Counts Eight and Nine assert "Equal Protection Violations and Denial of Affirmative Protection of Rights of Mother and Child" on behalf of the patient-plaintiffs, Santa Marie, Jones, and Doe, and the physician-plaintiffs, Dr. Jimenez, and Dr. Guerra DeLuna. *See id.* at 80, 84. Plaintiffs set forth a vague claim that New Jersey affirmatively denies "protection of the mother's fundamental interests in her relationship with her child, her interest in her child's life and denial of the affirmative protection of the child's life which is afforded other mothers and other children." *Id.* ¶¶ 133, 135. Plaintiffs pray for the same declaratory and injunctive relief sought under previous counts and detailed above. *See id.* at 81-83, 84-87. Further, plaintiffs seek an injunction requiring the state defendants to rescind "the express authorization of a licensed doctor to perform an abortion;" and to prohibit "a licensed doctor from performing an abortion within the state." *See id.* at 82, 86.

Appendix D

2. Abortion Law Claims

This subsection contains the final two counts of plaintiffs' voluminous complaint. Plaintiffs assert that the laws in New Jersey which allow for the practice of pregnancy termination creates an "arbitrary class of mothers and their children," because the laws "affirmatively protect the doctor's act in terminating the life of the child and destroying the mother's rights." *See id.* ¶ 136. Plaintiffs maintain that New Jersey affirmatively authorizes an abortion "anytime prior to full gestation and birth and even after twenty weeks gestation." *See id.* ¶ 137. Plaintiffs claim that New Jersey uses the full power of its laws to protect the choice of a physician to terminate a pregnancy, and the law also prevents a natural father from preventing an abortion. *See id.* Plaintiffs allege that New Jersey terminates the "mother's fundamental interest without an informed, knowing, voluntary waiver and the termination of the life of her child is itself protected and even placed beyond the political process and the power of the legislature." *Id.* ¶ 138.

Count Ten is entitled "The Equal Protection and Due Process Violations Due to New Jersey's Affirmative Protection of the Act of Killing the Child and Terminating the Mother's Rights." *Id.* at 89. Count Ten apparently alleges that the protection afforded by New Jersey's criminal and civil laws "affirmatively protect the act of a doctor who deliberately terminates the fundamental interests of the plaintiffs and all mothers in their class . . . which terminates the lives of their children . . . is unconstitutional as being in violation of both the Equal Protection and Due Process Clause of the Fourteenth Amendment." *Id.* ¶ 141. Plaintiffs

request declaratory relief holding that New Jersey law which provides "affirmative protection for the act of a doctor, hospitals or other health care providers which terminate a mother's relationship with her child and terminate her child's life . . . violates the Equal Protection Clause of the Fourteenth Amendment." *Id.* at 90. Plaintiffs also seek an injunction requiring the Board to recognize a duty of physicians to protect fetuses in the "same manner and degree which other matters as provided under the law where the child has been born alive." *Id.* at 91. Plaintiffs reiterate the relief requested under prior counts as detailed above. *See id.* at 92.

Finally, Count Eleven asserts the same allegations contained in Count Ten on behalf of the patients of the physician-plaintiffs, Jimenez and Guerra DeLuna. *See id.* ¶¶ 142-144. Plaintiffs request the same relief as the patient-plaintiffs in this regard. *See id.* at 94-97.

II. DISCUSSION

A. Plaintiffs' Motions to File Amicus Briefs and to Admit Counsel Pro Hac Vice and for a Hearing

The privilege to be heard as *amicus curiae* rests within the discretion of the court. *See Yip v. Pagano*, 606 F. Supp. 1566, 1568 (D.N.J. 1985). The role of *amici* is to act as a "friend of the court, providing guidance on question of law." *Bryant v. Better Business Bureau of Greater Maryland, Inc.*, 923 F. Supp. 720, 727 (D. Md. 1996). This Court "may grant leave to appear *amicus curiae* if 'it deems the proffered information timely and useful.' " *Liberty Lincoln Mercury, Inc. v. Ford Marketing Corp.*, 149 F.R.D. 65, 82 (D.N.J. 1993)

(*citing Yip*, 606 F. Supp. at 1568). A brief may be accepted by the court where it "provide[s] helpful analysis of the law." *Bryant*, 923 F. Supp. at 728. At the trial court level, where issues of fact and law predominate, the aid of *amicus curiae* may be less necessary than at the appellate level. *Yip*, 606 F. Supp. at 1568. If a court determines that the parties are adequately represented and the participation of *amicus curiae* is unnecessary because it will not aid in consideration of the relevant issues, leave to appear has often been denied. *See Liberty Lincoln Mercury*, 149 F.R.D. at 82. (string citing cases). Further, "where a petitioner's attitude toward the litigation is patently partisan, he should not be allowed to appear as *amicus curiae*." *Yip*, 606 F. Supp. at 1568.

The *amicus briefs* submitted by plaintiffs were authored by the formerly anonymous women who initiated the landmark litigation in *Roe v. Wade*, 410 U.S. 113 (1973), and its companion case, *Doe v. Bolton*, 410 U.S. 179 (1973). Both Sandra Cano Sauceda (formerly Jane Doe) and Norma McCorvey (formerly Jane Roe) express their personal views about abortion and their belief in the coercive nature of the procedure.

1. Amicus Brief of Sandra Cano-Sauceda

Cano-Sauceda's brief explains she can provide a "unique prospective of the *Doe v. Bolton* case not available from any other source." *Amicus Brief* of Sandra Cano-Sauceda (hereinafter "Sauceda Br.") at 2. Cano-Sauceda alleges that *Doe* was a "deceptive legal fiction[,]" and argues that a full trial on the merits in her case would have proven that "she never wanted an abortion." *Id.* at 8. Although she never had

an abortion, Cane-Sauceda contends "[s]he has experienced the feeling that the death of a child is her fault and experienced the helplessness the mother feels as events occur around her without any power to stop them." *Id.* at 10. Finally, Cano-Sauceda alleges "because of abortion's legality many women are coerced by their sexual partner into believing that it is her duty to relieve him of the burden of fatherhood, rather than his legal duty to support the innocent child." *Id.* at 20. According to her view, "abortion involves the taking of an innocent life."

In the Court's view, the proposed *amicus* presents the same issues and allegations as plaintiffs' amended complaint. The plaintiffs in this case are more than adequately represented. In fact, plaintiffs submitted an eighty page brief in opposition to defendant's motion to dismiss.[4] The *amicus brief* submitted by Cano-Sauceda is patently partisan, presenting her beliefs about the abortion procedure and what she perceives to be the effects of that procedure on society. Finally, Cano-Sauceda's brief does not provide any guidance as to the controlling law which this Court is bound to follow. As such, the Court, in its discretion, denies the motion for Sandra Cano-Sauceda to file an *amicus brief.*

2. Amicus Brief of Norma McCorvey

Norma McCorvey urges this Court to conduct a trial to "look at all the evidence in order to reach a proper legal conclusion." *See Amicus Brief* of McCorvey (hereinafter

4. Plaintiffs complaint itself reads much like a brief in support of plaintiffs position rather than the simple fact pleading as required by Fed. R. Civ. P. 8(a).

"McCorvey Br.") at 4. McCorvey characterizes abortion as "the coerced waiver of a constitutional right, not an informed choice." *Id.* at 5. She alleges there is an "inherent and irreconcilable conflict between a woman's right to the relationship with her child, and the [Supreme] Court's allowance of the uninformed, non-voluntary termination of that right." *Id.* at 6. McCorvey argues that *Roe v. Wade* should be overturned because "[w]omen have been and continue to lose their rights under *Roe* and *Casey* to the physicians who perform abortions. *Id.* at 6, 11. Finally, she argues that a trial establishing the "humanity" of an unborn fetus will require the reversal of nearly thirty years of jurisprudence. *See id.* at 13, 15-16.

As already determined, the plaintiffs are more than adequately represented by counsel and the current parties in interest, and supplementation by way of McCorvey's *amicus brief* is unnecessary. Additionally, McCorvey's arguments urging rejection of United States Supreme Court precedent does not provide this Court with any additional insight into the current state of the law, nor does it clarify the legal issues which must be examined by the Court. Therefore, the Court also denies Norma McCorvey's motion to file an *amicus brief.*

3. Motion to Admit Counsel Pro Hac Vice

Because this Court has declined to allow the arguments and briefs of *amicus* in the instant case, there is no need for the appearance of counsel on behalf of Sandra Cano-Sauceda and Norma McCorvey. Therefore, the motions to admit Allan E. Parker, Jr., Richard Clayton Trotter, and Kathleen Cassidy

Goodman as *pro hac vice* counsel to appear for Sandra Cano-Sauceda and Norma McCorvey are hereby denied.

4. Motion for a Hearing Regarding an Interlocutory Order

As the Court has determined dismissal of plaintiffs' complaint is warranted, plaintiffs' request for a hearing to determine if an interlocutory order should issue is also denied.

B. Motion to Dismiss

A motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) may be granted only if, accepting all well pleaded allegations in the complaint as true, and viewing them in the light most favorable to plaintiff, plaintiff is not entitled to relief. *See Bartholomew v. Fischl*, 782 F.2d 1148, 1152 (3d Cir. 1986); *Angelastro v. Prudential-Bache Securities, Inc.*, 764 F.2d 939, 944 (3d Cir.), *cert. denied*, 474 U.S. 935 (1985). The Court may nor dismiss a complaint unless plaintiff can prove no set of facts that would entitle her to relief. *See Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Angelastro*, 764 F.2d at 944. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). In setting forth a valid claim, a party is required only to plead "a short plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a).

Under Rule 12(b)(6), the Court must "accept the allegations in the complaint as true, and draw all *reasonable factual* inferences in favor of the plaintiff. [The motion can be granted] only if no relief could be granted under any set of

facts that could be proved." *Turbe*, 938 F.2d at 428 (*citing Unger v. National Residents Matching Program*, 928 F.2d 1392, 1394-95 (3d Cir. 1991) (emphasis added); *see also Dykes v. Southeastern Pennsylvania Transp. Auth.*, 68 F.3d 1564, 1565, n. 1 (3d Cir. 1995); *Piecknick v. Commonwealth of Pennsylvania*, 36 F.3d 1250, 1255 (3d Cir. 1994); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1261 (3d Cir. 1994). A complaint may be dismissed for failure to state a claim where it appears beyond any doubt that no relief could be granted under any set of facts which could be proved consistent with the allegations. *See Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

A complaint should not be dismissed unless it appears beyond doubt that "the facts alleged in the complaint, even if true, fail to support the claim." *Ransom v. Marrazzo*, 848 F.2d 398, 401 (3d Cir. 1988). Legal conclusions made in the guise of factual allegations, however, are given no presumption of truthfulness. *See Papasan v. Allain*, 478 U.S. 265, 286 (1986); *see also Morse v. Lower Merion Sch. Dist.*, 132 F.3d 902, 906 (3d Cir. 1997) ("[A] court need not credit a complaint's 'bald assertions' or 'legal conclusions' when deciding a motion to dismiss").

A district court reviewing the sufficiency of a complaint has a limited role. "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support his [or her] claims." *Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974). Generally, when conducting such an inquiry, material beyond the pleadings should not be considered. *See In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1426 (3d Cir. 1997); *Pension Benefit Guar.*

Corp. v. White Consol. Indus., 998 F.2d 1192, 1196 (3d Cir.), *cert. denied*, 510 U.S. 1042 (1994); *Gannon v. Continental Ins. Co.*, 920 F. Supp. 566, 574 (D.N.J. 1996).

Plaintiffs' claim must be dismissed for failure to state a claim under Fed. R. Civ. P. 12(b)(6). Plaintiffs' complaint requests relief which binding precedent has already conclusively declined to create. The Court of Appeals for the Third Circuit examined both equal protection and due process challenges to the New Jersey Wrongful Death and Survival statutes, and has conclusively determined that the statutory scheme is constitutionally permissible. *See Alexander v. Whitman*, 114 F.3d 1392 (3d Cir. 1997). Additionally, the United States Supreme Court has determined "the Constitution offers basic protection to a woman's right to choose whether to have an abortion." *Stenberg v. Carhart*, __ U.S. __, 120 S.Ct. 2597, 2600 (2000) (*citing Planned Parenthood v. Casey*, 505 U.S. 833 (1992), *Roe v. Wade*, 410 U.S. 113 (1973)). Accordingly, this Court's determination of the issues set forth by the parties in this motion to dismiss are conclusively governed by direct precedent. Given the lengthy and confusing nature of plaintiffs' complaint, the Court will examine the sufficiency of each of the "subsections" as described above. *See* Section IC *infra.*

1. Equal Protection Claims

This "subsection" encompasses all of plaintiffs' claims relating to the alleged denial of equal protection of the New Jersey Wrongful Death and Survival statutes as well as the equal protection claim under general New Jersey statutory law. *See* Section IC 1(a) and (b) *infra.* All of the named plaintiffs challenge the New Jersey Wrongful Death and

Survival statutes on essentially the same grounds. *See* Pls.' Am. Compl. ¶ 40-120. Plaintiffs claim New Jersey violates their equal protection rights and the rights of other women similarly situated by creating a subclass of pregnant women, namely those who have elected to terminate their pregnancies, because they are disallowed under the statutory scheme to assert wrongful death and survivorship claims.[5] *See id.* Plaintiffs raise the same arguments on behalf of the purported class of terminated fetuses. *See id.* Plaintiffs allege they are subject to "an arbitrary and capricious classification" because they are unable to assert wrongful death and survival claims on behalf of their terminated fetuses in the same manner as women whose children suffer a pre-birth injury that causes death subsequent to their live birth. *See id.* ¶ 48.

Count One through Count Seven make nearly identical claims to those raised by the plaintiffs in *Alexander.* The plaintiffs in that case argued they were denied equal protection and due process under the Wrongful Death and Survival statutes of New Jersey, in that they denied recovery

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5. The Court doubts the physician-plaintiffs in this case have standing to raise the claims on behalf of their pregnant patients, because they have not alleged a legally protected interest that presents a concrete redressable injury which is causally connected to the claimed interest. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). The physician's bare allegations of such an indirect injury are most likely not sufficient to present an actual case or controversy. *See Roe*, 410 U.S. at 128. However, since their claims are almost identical to the claims raised by the patient-plaintiffs, the Court will not engage in a lengthy review of their standing. Their argument that the physician-plaintiffs may lose patients and may lose money because they refuse to perform abortions does not change this Court's analysis of the substance of plaintiffs' claims.

on behalf of stillborn fetuses. *See Alexander*, 114 F.3d at 1397. Plaintiff Karen Alexander was admitted to the Jersey Shore Medical Center to give birth to an apparently healthy baby. *See id.* at 1396. However, the child was stillborn due to cardio-vascular collapse. *See id.* Ms. Alexander filed a lawsuit on behalf of her stillborn child pursuant to the Wrongful Death and Survival statutes. *See id.* at 1397. However, the Surrogate of Monmouth County refused to issue the requisite Letters of Administration Ad Prosequendum. *See id.* Ms. Alexander instituted a federal class action lawsuit pursuant to 42 U.S.C. § 1983 in the United States District Court for the District of New Jersey, seeking a declaration that the New Jersey statutes were unconstitutional and an order directing the county surrogates to issue letters of administration on behalf of stillborn fetuses. *See id.* The *Alexander* plaintiffs claimed the statutes created a subclass of mothers whose children were injured in utero, who were unable to pursue the same remedies as women whose children also suffered pre-natal injuries, but were born alive. *See id.* The plaintiffs sued on behalf of all mothers who were similarly situated. *See id.* The lawsuit was also instituted on behalf of Ms. Alexander's stillborn child and on behalf of all other stillborn children similarly situated. *See id.*

The district court dismissed the claims presented by Ms. Alexander and her lawyer. *See id.* The Supreme Court of New Jersey has determined that the Wrongful Death statute "does not permit recovery attributable to the wrongful death of an infant before birth. *See Giardina v. Bennett*, 111 N.J. 412, 413 (1988). The court determined that although negligence which causes a pre-birth death may constitute a tort against the parents for the infliction of emotional distress,

it does not follow that New Jersey must also afford actions for their wrongful death and survival. *See id.* at 418. The court interpreted the statute as referring specifically only to a "person." *See id.* at 421. In construing a host of New Jersey common and statutory law, the court determined children acquire rights only after birth. *See id.* at 425. It is this interpretation the *Alexander* and the *Santa Marie* plaintiffs contest. *See Alexander*, 114 F.3d at 1399.

Plaintiffs also complain that the Survival statute similarly creates an unconstitutional subclass of women who may not recover on behalf of their terminated fetuses. *See* Pls.' Am. Compl. ¶ 103. The survival cause of action, like the wrongful death action, is a creature of statute. *See Alexander*, 114 F.3d at 1399. Akin to the wrongful death claim, it is clear the legislature "did not intend to provide the parents of unborn or stillborn fetuses with a statutory cause of action for survival." *Id.* Therefore, the district court in *Alexander* determined "New Jersey's survival action, like the wrongful death action, is limited to situations where the fetus survives until after birth." *Id.* at 1400.

The holding in *Alexander* has been expressly approved by the Court of Appeals for the Third Circuit. Therefore, plaintiffs "can only establish a claim on behalf of [their] child[ren] under the Fourteenth Amendment if the children "fall within the protections afforded 'person[s]' as that term is used" in the amendment. *Alexander*, 114 F.3d at 1400. As a legal issue, the scope of the Fourteenth Amendment has been conclusively limited to persons "only postnatally." *See Roe*, 410 U.S. at 157. As a matter of federal constitutional law, "a fetus is a 'developing organism' that is not yet

a 'person' and does not have what is described as a 'right to life.' " *Alexander*, 114 F.3d at 1400 (*quoting Planned Parenthood*, 505 U.S. at 913, (Stevens, J., concurring in part and dissenting in part)). "The issue is not whether the unborn are human beings, but whether the unborn are constitutional persons." *Alexander*, 114 F.3d at 1402. In response, the United States Supreme Court has consistently reiterated fetuses are not constitutional persons. *See id.* (*citing Planned Parenthood*, 505 U.S. at 855-61; *Roe*, 410 U.S. at 157).

Based upon these findings, the Third Circuit determined that the *Alexander* plaintiffs' claims on behalf of stillborn children could not be sustained. *See Alexander*, 114 F.3d at 1402. The Third Circuit also affirmed the dismissal of plaintiffs' claims on behalf of Ms. Alexander, under both the equal protection and due process claims. *See id.* at 1406, 1408. The New Jersey legislature has not left women who have obtained an abortion without informed consent, without a legal redress for the negligence of physicians. *See id.* at 1404. Patients who believe they submitted to an abortion without proper consent may seek redress in the state courts on that specific claim.

The *Santa Marie* plaintiffs claim this Court should undertake a strict scrutiny review of the New Jersey legislative scheme because the statutes impact on the "constitutionally protected interests of the mother in her relationship with her child." *See* Plaintiffs' Brief in Opposition to Defendant's Motion to Dismiss ("Pls.' Br. in Opp.") at 27. However, this issue has also been decided with regard to the Wrongful Death and Survival statutes. The statutes are entitled to deference because a fundamental right is not jeopardized by the New

Jersey statutes. *See Alexander*, 114 F.3d at 1403. The New Jersey statutes at issue do not affect plaintiffs' relationships with their unborn children, rather they only dictate an inability to recover for the loss of that pre-natal relationship through a wrongful death or survival cause of action. *See id.* at 1404. As it was impossible for the Third Circuit to imagine that any decision Karen Alexander might have made with regard to her stillborn child would be impacted by the existence or denial of these causes of action, this Court cannot conceive that a woman's choice to terminate her pregnancy would be influenced by the availability of such a legal remedy. *See id.* The statutes at issue did not affect plaintiffs' relationships with their unborn children. *See id.*

Therefore, the Court reviews the challenged statutes under a rational basis test, which dictates that if "the state identifies a legitimate interest that the legislature could rationally conclude was served by the statute." A rational basis review entails a "presumption of validity against attack under the Equal Protection Clause." *See Parham v. Hughes*, 441 U.S. 347, 351 (1979). New Jersey has a legitimate interest in limiting the recovery available under its statutory tort law, and the bright line established in Giardina requiring live birth for a wrongful death or survival action is rationally related to that interest. *See* Brief of State Defendants in Support of Motion to Dismiss ("Defs.' Br.") at 27 (*citing Alexander*, 114 F.3d at 1406).

Plaintiffs' claims and the alleged plaintiffs' class, bear a striking resemblance to the claims disposed of by the Third Circuit in *Alexander*. Both actions challenge the application and the interpretation of the Wrongful Death and Survival

statutes as being violative of plaintiffs' equal protection and due process rights. *See Alexander*, 114 F.3d at 1397. Further, plaintiffs in the present case are women who represent a class of women similarly situated and their fetuses represent a class of fetuses similarly situated. *See* Pls.' Am. Compl. at 2. Karen Alexander's attorney also served as a plaintiff raising the same constitutional arguments on behalf of his clients, alleging a potential loss of income because of the New Jersey statute. *See Alexander*, 114 F.3d at 1397. In the same manner, the physician-plaintiffs also allege constitutional violations on behalf of their patients and claim a potential loss of income because of the possibility that women they treat will seek other physicians when the plaintiffs decline to perform an abortion. *See* Pls.' Am. Compl. ¶ 92. Additionally, the *Alexander* plaintiffs claimed the statutes were unconstitutional because they excluded recovery on behalf of stillborn fetuses. *See Alexander*, 114 F.3d at 1397. As in *Alexander*, plaintiffs attempt to characterize the allegations as "a matter of fact" in an attempt to abrogate the Court's power to review the complaint for sufficiency. Plaintiffs state that as a "matter of fact," a child at every gestational stage is a complete and separate human being. *See* Pl.'s Am. Compl. ¶ 17. However this "fact" does not change the law that controls the outcome of this case. *See* 114 F.3d at 1401. The Court's inquiry on a motion to dismiss is not a factual one, but a legal one. *See id.*

Plaintiffs argue that the instant lawsuit is different because it addresses abortion, and *Alexander* did not. *See* Plaintiffs' Reply Brief in Support of Cross-Motion for Hearing (hereinafter "Pls.' Hearing Reply Br.") at 1. Plaintiffs argue that *Alexander* is inapposite because it did not address

the validity of the wrongful death statute in the abortion context. *See id.* However, the Court does not appreciate the legal distinction plaintiffs allege. Plaintiffs claim that their fetuses died as the result of the physician's negligence. *See* Pls.' Am. Compl. ¶ 51. The plaintiffs in *Alexander* also claimed entitlement to a wrongful death cause of action on behalf of Ms. Alexander's fetus due to the negligence of physicians.[6] *See Alexander*, 114 F.3d at 1392. The instant plaintiffs argue the statutes are unconstitutional because they deny recovery on behalf of aborted fetuses. *See* Pls.' Am. Compl. ¶ 1. They claim there is not a substantive difference between mothers who deliver live children and women whose fetuses die in utero, and this "similarity" presents a matter for trial. *See* Pls.' Reply Br. for Hearing at 2. A discrepancy in the facts of a particular case may be sufficient to withstand a motion for summary judgment, however, plaintiffs have failed to present any facts which would entitle them to relief from this Court in light of the binding precedent set out in this jurisdiction. Given the high degree of similarity between the two cases, it is evident that, even accepting all of plaintiffs factual allegations as true, no relief could be granted under any set of facts proposed by plaintiffs, as the issue of the statutes' constitutionality has already been squarely determined. *See Alexander*, 114 F.3d at 1398. Therefore, the Court dismisses Count One through Count Seven for failure to state a claim upon which relief may be granted.

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6. The facts presented in *Alexander* present a more compelling situation for the recognition of the rights plaintiffs claimed than the instant situation in that the *Santa Maire* plaintiffs made elections about the treatment of their fetuses, whereas Ms. Alexander was powerless to prevent her tragedy.

Appendix D

2. Equal Protection Violations under New Jersey Law

Counts Eight and Nine assert a bald allegation that New Jersey denies the protection of a mother's fundamental interest in her relationship with her child. *See* Pls.' Am. Compl. ¶¶ 132-135. The counts do not specify the nature of the state's violation, but rather states a general claim that New Jersey fails to protect that "fundamental interest" and fails to provide "affirmative protection of the child's life." *Id.* ¶¶ 133, 135. The repetitive and intangible nature of plaintiffs' allegations in these two counts warrants dismissal for failure to state a claim. There is no notice as to which state actions or failures to act constitute the alleged denial of "affirmative protection," nor do the Counts specify a factual basis for the averments. *See id.* Even construing Counts Eight and Nine to "do substantial justice," as required by Fed. R. Civ. P. 8(f), the Court cannot find a stated claim in these Counts. Therefore, Counts Eight and Nine are dismissed.

3. Abortion Claims

Plaintiffs final claims, Counts Ten and Eleven, serve as an attack on the legalized nature of pregnancy termination. *See* Pls.' Am. Compl. ¶¶ 141, 144. This is not an abortion case as plaintiffs' have framed it. However, plaintiffs have attempted to use this venue in challenging the validity of the New Jersey statutes, which have already been upheld as constitutional, as an opportunity to introduce an amorphous claim against the validity of abortion laws. *See id.* The central tenet of *Roe v. Wade*, involved the creation of a woman's right to terminate her pregnancy prior to

viability. *See Planned Parenthood*, 505 U.S. at 871. States may enact rules and regulations designed to encourage a woman to know there are arguments against abortion and that there are viable alternatives to the procedure. *See id.* at 872. However, there is no requirement that states do so. More specifically, states are free to regulate in the area of abortion, however, "when the state regulation imposes an undue burden on a woman's ability to make this decision . . . the power of the state reach[es] into the heart of the liberty protected by the Due Process clause." *See id.* at 874. An undue burden is one that has the "purpose or effect or placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *See id.* at 877. Clearly declaratory or injunctive relief sought by plaintiffs mandating the Board to "[p]rohibit all doctors, hospitals or other health care providers from terminating the life of a child by abortion, at any age of gestation," would constitute an "undue burden" on a woman's right to chose. *See* Pls.' Am. Compl. at 96.

Plaintiffs also seek to have this Court exercise its equitable powers to impose their proposed views requiring doctors to provide specified medical advice prior to performing a termination procedure. *See Id.* The "straightjacket" approach of prescribing particular information which must be given in every case in which a woman seeks to terminate a pregnancy "interferes with a constitutional right of privacy between a pregnant woman and her physician." *See Planned Parenthood*, 505 U.S. at 883. Further, this type of legislation is not within the province of this Court, especially when it has been determined there are no protected rights which are threatened. Rather, these are issues for the legislature, which is much better equipped to evaluate what, if any restraints

would be desirable or even permissible for the state to implement if it would choose to do so.

Further, it is debatable if plaintiffs even have standing to challenge the current "abortion laws." In order to have standing to challenge the absence of a law regulating abortion in the manner proposed by plaintiffs, they must meet the constitutional minimum requirements. The constitutional requirements include 1) suffering or facing imminent suffering of an "injury in fact;" 2) the injury must be fairly traceable to the defendant's conduct; and 3) the requested relief must be likely to redress the injury. *See Planned Parenthood of Central New Jersey v. Farmer*, 220 F.3d 127,146 (3d Cir. 2000). Plaintiffs main contention in the complaint is they were denied the wrongful death and survival causes of action on behalf of their aborted fetuses. *See* Pls.' Am. Compl. ¶ 1. Under the facts presented in the complaint, plaintiffs assert they have suffered an alleged injury by the denial of the statutory causes of action. While the alleged injury, if one did exist under current binding precedent, would certainly be "fairly traceable" to the defendant's denial of the causes of action, the relief requested in final two counts, banning abortion, would hardly redress their alleged injury for being unable to state a claim of wrongful death or survival on behalf of their fetuses. *See e.g. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 105 (1998). Based on the forgoing, plaintiffs have clearly failed to state a claim for the abolition of the medical procedures for terminating a pregnancy.

Appendix D

III. CONCLUSION

Therefore, for the reasons expressed above, plaintiffs' motion to withdraw Counts Three and Six on behalf of plaintiff Mary Doe is granted and plaintiffs' motions for a hearing regarding an interlocutory order and for leave to file *amicus briefs* and motion to admit counsel *pro hac vice*, are denied, and defendants' motion to dismiss is hereby granted.

s/ Garrett E. Brown
GARRETT E. BROWN, JR., U.S.D.J.

Appendix D

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Civ. No. 99-2692 (GEB)

DONNA SANTA MARIE, et. al.,

Plaintiffs,

v.

CHRISTINE TODD WHITMAN, et. al.,

Defendants.

ORDER

This matter having come before the Court upon plaintiffs' motions to withdraw certain claims; for a hearing regarding an interlocutory order, for leave to file two *amicus briefs*; and to admit certain counsel pro hoc vice; and upon defendants' motion to dismiss; and this Court having reviewed the parties' submissions pursuant to Fed R. Civ. P. 78; and for the reasons expressed in the memorandum opinion of this date; and for good cause shown;

IT IS THIS 27th day of November, 2000

ORDERED that Counts Three and Six on behalf of Mary Doe be and hereby are WITHDRAWN; and

Appendix D

IT IS FURTHER ORDERED that plaintiffs' motion for a hearing to determine if an interlocutory order should issue be and hereby is DENIED; and plaintiffs' motion to file two *amicus briefs* and to admit certain counsel pro hac vice be and hereby are DENIED; and

IT IS FURTHER ORDERED that defendants' motion to dismiss be and hereby is GRANTED.

s/ Garrett E. Brown
GARRETT E. BROWN, JR., U.S.D.J.

APPENDIX E — STATUTES INVOLVED

TITLE 2A. ADMINISTRATION OF
CIVIL AND CRIMINAL JUSTICE
SUBTITLE 6. CIVIL ACTIONS
CHAPTER 31. ACTIONS BY WRONGFUL DEATH

§ 2A:31-1. When action lies

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime.

§ 2A:31-2. Persons entitled to sue or make claim

Every action commenced under this chapter shall be brought in the name of an administrator ad prosequendum of the decedent for whose death damages are sought, except where decedent dies testate and his will is probated, in which event the executor named in the will and qualifying, or the administrator with the will annexed, as the case may be, shall bring the action.

Appendix E

§ 2A:31-3. Limitation of actions; exceptions

Every action brought under this chapter shall be commenced within 2 years after the death of the decedent, and not thereafter, provided, however, that if the death resulted from murder, aggravated manslaughter or manslaughter for which the defendant has been convicted, found not guilty by reason of insanity or adjudicated delinquent, the action may be brought at any time.

§ 2A:31-4. Persons entitled to amount recovered

The amount recovered in proceedings under this chapter shall be for the exclusive benefit of the persons entitled to take any intestate personal property of the decedent, and in the proportions in which they are entitled to take the same. If any of the persons so entitled were dependent on the decedent at his death, they shall take the same as though they were sole persons so entitled, in such proportions, as shall be determined by the court without a jury, and as will result in a fair and equitable apportionment of the amount recovered, among them, taking into account in such determination, but not limited necessarily thereby, the age of the dependents, their physical and mental condition, the necessity or desirability of providing them with educational facilities, their financial condition and the availability to them of other means of support, present and future, and any other relevant factors which will contribute to a fair and equitable apportionment of the amount recovered.

Appendix E

§ 2A:31-5. Assessment of damages by jury

In every action brought under the provisions of this chapter the jury may give such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased, to the persons entitled to any intestate personal property of the decedent.

Appendix E

TITLE 9. CHILDREN—JUVENILE AND DOMESTIC RELATIONS COURTS
SUBTITLE 2. ADOPTION
CHAPTER 3. ADOPTION IN GENERAL

§ 9:3-46. Objection to adoption

a. A person who is entitled to notice pursuant to section 9 of P.L.1977, c.367 (C.9:3-45) shall have the right to object to the adoption of his child within 20 days after the filing of the complaint for adoption for a State resident and 35 days after the filing in the case of a nonresident. Failure to object within that time period constitutes a waiver of the right to object.

* * * *

§ 9:3-39.1. Offering, assisting in the placement of child for adoption, conditions

* * *

(b) The birth parent, except one who cannot be identified or located prior to the placement of the child for adoption, shall be offered counseling as to his or her options other than placement of the child for adoption. Such counseling shall be made available by or through an approved licensed agency in New Jersey or in the birth parent's state or country of residence.

Appendix E

The fact that counseling has been made available, and the name, address and telephone number of the agency through which the counseling is available, shall be confirmed in a written document signed by the birth parent and acknowledged in this State pursuant to section 1 of P.L.1991, c.308 (R.S. 46:14-2.1) or acknowledged in another state or country pursuant to section 1 of P.L.1991, c.308 (R.S. 46:14-6.1) a copy of which shall be provided to the birth parent and the agency conducting the adoption complaint investigation pursuant to section 12 of P.L.1977, c.367 (C.9:3-48) and shall be filed with the court prior to termination of parental rights; and

(c) Written notice shall be given to the birth parent, except one who cannot be identified or located prior to the placement of the child for adoption, and the adoptive parent that the decision not to place the child for adoption or the return of the child to the birth parent cannot be conditioned upon reimbursement of expenses by the birth parent to the adoptive parent, and that payments by the adoptive parent are non-refundable. Provision of such notice shall be confirmed in a written document signed by the birth parent and adoptive parent in separate documents which shall be acknowledged in this State pursuant to

section 1 of P.L.1991, c.308 (C.46:14-2.1) or acknowledged in another state or country pursuant to section 1 of P.L.1991, c.308 (R.S. 46:14-6.1), a copy of which shall be provided to the birth parent, and the agency conducting the adoption complaint investigation pursuant to section 12 of P.L.1977, c.367 (C.9:3-48), and shall be filed with the court prior to termination of parental rights.

b. The Superior Court in an action by the Commissioner of Human Services may enjoin any party found by the court to have violated this section from any further violation of this section.

c. A person, firm, partnership, corporation, association, or agency violating subsection a. of this section shall be guilty of a crime of the third degree.

d. A person, firm, partnership, corporation, association, intermediary or agency other than an approved agency which pays, seeks to pay, receives, or seeks to receive money or other valuable consideration in connection with the placement of a child for adoption shall be guilty of a crime of the second degree.

Appendix E

e. It shall not be a violation of subsection d. of this section:

(1) to pay, provide or reimburse to a parent of the child, or for a parent of the child to receive payment, provision or reimbursement for medical, hospital, counseling or other similar expenses incurred in connection with the birth or any illness of the child, or the reasonable living expenses of the mother of the child during her pregnancy including payments for reasonable food, clothing, medical expenses, shelter, and religious, psychological, vocational, or similar counseling services during the period of the pregnancy and for a period not to exceed four weeks after the termination of the pregnancy by birth or otherwise. These payments may be made directly to the birth mother or on the mother's behalf to the supplier of the goods or services, or

(2) where the child is from a foreign country, reasonable and customary fees and expenses of a foreign agency or attorney for the care or representation of the child during any period of foster or institutional care in the child's country of origin, or

(3) reasonable attorney fees and costs for legal services.

Appendix E

§ 9:3-40. Qualification of agencies for approval

The Commissioner of Human Services shall promulgate rules and regulations relating to the qualification of agencies for approval to make placements for adoption in New Jersey. The rules and regulations shall include, but shall not be limited to standards of professional training and experience of staff and requirements relating to responsibilities of trustees, officers or other persons supervising or conducting the placement for adoption program, adequacy of facilities, maintenance and confidentiality of casework records and furnishing of reports. In the selection of adoptive parents the standard shall be the best interests of the child; and an approved agency shall not discriminate with regard to the selection of adoptive parents for any child on the basis of age, sex, race, national origin, religion or marital status provided, however, that these factors may be considered in determining whether the best interests of a child would be served by a particular placement for adoption or adoption.

§ 9:3-41. Surrender of child

a. Surrender of a child to an approved agency for the purpose of adoption, other than a surrender taken in accordance with P.L.1955, c.232 (C.9:2-13 et seq.), shall be by a signed instrument acknowledged by the person executing the instrument before an officer authorized to take

acknowledgments or proofs in the State in which the instrument is executed. Prior to the execution of the surrender, the approved agency shall, directly or through its agent, inform the person executing the surrender that the instrument is a surrender of parental rights by the signatory and means the permanent end of the relationship and all contact between the parent and child. The approved agency shall advise the parent that the surrender shall constitute relinquishment of the person's parental rights in or guardianship or custody of the child named therein and consent by the person to adoption of the child. The approved agency shall offer counseling to the parent, prior to the execution of the surrender. The surrender shall be valid and binding without regard to the age of the person executing the surrender and shall be irrevocable except at the discretion of the approved agency taking such surrender or upon order or judgment of a court of competent jurisdiction setting aside such surrender upon proof of fraud, duress or misrepresentation by the approved agency. . . .

b. Any approved agency may accept custody of a child by a duly executed instrument of surrender from a parent or guardian of the child or from another approved agency or any agency for the care and protection of children approved by any other state, by the United States or by any foreign country, which has duly obtained the authority to place the child for adoption.

c. A surrender executed in another state or foreign country by a domiciliary of that state or country and valid where executed shall be deemed a valid surrender in this State if taken more than 72 hours after the birth of the child.

d. At the request of a parent of the child, an approved agency authorized to receive surrenders, may receive that parent's surrender of his child for purposes of having the child adopted by a person specified by the surrendering parent. The agency shall follow all regulations regarding the securing of a surrender and shall cooperate with the prospective parents in the processing of the proposed adoption. An adoption based on a surrender under this subsection shall be deemed one in which the child was received from an approved agency for purposes of section 11 of P.L.1977, c.367 (C.9:3-47).

e. A surrender of a child shall not be valid if taken prior to the birth of the child who is the subject of the surrender. A surrender by the birth parent of a child shall not be valid if taken within 72 hours of the birth of the child. The denial of paternity by an alleged father, at any time including prior to the birth of the child, shall be deemed a surrender for purposes of allowing the child to be adopted.

Appendix E

§ 9:3-45. Notice of complaint to parents

a. In an adoption proceeding pursuant to P.L.1977, c.367 (C.9:3-37 et seq.), notice of the complaint may not be waived and a notice of hearing shall be served in accordance with the Rules of Court on each parent of the child to be adopted. The notice shall inform each parent of the purpose of the action and of the parent's right to file written objections to the adoption within 20 days after notice is given in the case of a resident and 35 days in the case of a nonresident. For purposes of this section, "parent" means (1) the husband of the mother of a child born or conceived during the marriage or (2) a putative or alleged biological mother or father of a child.

b. Notice pursuant to subsection a. of this section shall not be served on a parent:

* * *

(4) Who has given the child for adoption to the adopting parent, and the Superior Court, Chancery Division, Family Part, after a hearing at which the surrendering parent was heard as to the voluntariness of the surrender, has determined that the surrender was voluntary and proper;

* * *

e. In conducting the hearing required by paragraph (4) of subsection b. of this section, the court shall determine that the surrender is voluntary and that the birth parent knows (1) that the hearing is to surrender birth rights; (2) that the hearing is to permanently end the relationship and all contact between parent and child; (3) that such action is a relinquishment and termination of parental rights and consent on the part of the birth parent to the adoption; and (4) that no further notice of the adoption proceedings shall be provided to the birth parent if the surrender is accepted by the court.

§ 9:3-47. Action on complaint for adoption of child received from approved agency

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c. The adoption hearing shall be held in camera. If a parent of the child has made an objection to the adoption, in accordance with section 10 of P.L.1977, c.367 (C.9:3-46), the court shall take evidence relating to the objection. If the court finds against the objecting parent in accordance with subsection a. of section 10 of P.L.1977, c.367 (C.9:3-46), it shall make an order terminating the parental rights of the parent and proceed with the hearing.

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Appendix E

§ 9:3-50. Entry of judgment of adoption, effect; inheritance rights

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c. The entry of a judgment of adoption shall:

(1) terminate all parental rights and responsibilities of the parent towards the adoptive child except for a parent who is the spouse of the petitioner and except those rights that have vested prior to entry of the judgment of adoption;

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